Ontario. Administration of Justice, Select Committee on
Report. 1941.

ONTARIO

LEGISLATIVE ASSEMBLY

REPORT

OF THE

SELECT COMMITTEE

APPOINTED TO ENQUIRE INTO THE

ADMINISTRATION OF JUSTICE

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Report of the Select Committee Appointed to Inquire into the Administration of Justice

To the Honourable the Legislative Assembly of the Province of Ontario:

GENTLEMEN:

The Committee of the Ontario Legislature appointed to inquire into the administration of justice in the Province begs to submit the following report:

The Committee was appointed by Order of the Ontario Legislature on Wednesday, February 21st, 1940, to inquire into:

> The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts, with a view to—
>
> (i) improving the constitution, organization and the system of maintenance of the said courts,
>
> (ii) simplifying, facilitating, expediting and otherwise improving practice and procedure in the said courts, and
>
> (iii) effecting economy to the people, the municipalities and to the Province generally,
>
> and to report upon what amendments are necessary or desirable to the existing law.

The Committee comprised—

The Honourable G. D. Conant, K.C., M.P.P., Attorney-General of Ontario, Chairman,

The Honourable Paul Leduc, K.C., M.P.P., Minister of Mines,

Messrs. Ian T. Strachan, K.C., M.P.P.,

Richard D. Arnott, K.C., M.P.P.,

Leslie M. Frost, K.C., M.P.P.

During the final sittings of the Committee the Honourable Mr. Leduc ceased to be a member by reason of his appointment as Registrar of the Supreme Court of Canada which prevented him from continuing as a member of the Ontario Legislature. While pleased to learn of the appointment of Mr. Leduc to the important post which he now ably occupies, the remaining members of the

Committee regret that his valued counsel was not available in their final deliberations.

The Committee met on March 6th at the Parliament Buildings in Toronto at which time Mr. C. R. Magone, K.C., Senior Solicitor of the Attorney-General's Department, was appointed Committee Counsel and Mr. E. H. Silk, K.C., Legislative Counsel, was appointed assistant counsel. Subsequently Mr. Silk was appointed as counsel succeeding Mr. Magone, and Mr. Robert Hicks was appointed secretary of the Committee.

Arrangements were made for the publication in the Ontario Weekly Notes of the report made by Mr. F. H. Barlow, K.C., Master of the Supreme Court of Ontario, on the administration of justice, and, in the same issue of the Ontario Weekly Notes, members of the legal profession and others were invited to present submissions to the Committee. Notice of the appointment and of the dates of sittings of the Committee were also sent to the judges, officials of the courts, legal and other organizations and other persons closely connected with the administration of justice as well as to boards of trade and chambers of commerce, insurance companies, loan companies and labour organizations. A list of persons to whom notices of the appointment and sittings of the Committee were sent appears as schedule "A" to this report. In addition the Chairman on several occasions expressed publicly the willingness of the Committee to receive submissions.

The Committee held public sittings at the Parliament Buildings on April 2nd, 3rd, 4th, 5th, 9th, 10th, 11th and 12th; on September 23rd, 24th, 25th and 30th, and on October 1st, 1940. A list of the persons who appeared before the Committee and an indication of the organizations represented by some of the persons so appearing, appears as Schedule "B".

The Committee was impressed by the co-operative spirit of the members of the Bench and Bar and other persons who appeared before it. In many instances the views expressed were not those of any individual but were made on behalf of an association or organization which had interested itself in the Committee's undertaking. Other bodies were of assistance to the Committee by filing written submissions. Government officials of the other provinces of Canada kindly furnished information to Committee counsel which was of great value.

It is significant that on comparatively few of the subjects under consideration were the views of persons making representations unanimous or substantially the same. Even among the barristers who appeared, many of whom were Benchers of the Law Society, a substantial divergence of opinion was apparent on many matters.

While most of the recommendations made in the report may be effected by provincial legislation, some will undoubtedly require to be implemented by Dominion legislation. In particular the Criminal Code will require amendment if effect is to be given to certain of the recommendations of the Committee. The Committee respectfully recommends that the necessary action in this regard be taken.

For convenience the matters considered will be here dealt with in alphabetical order.

ACTIONS AGAINST THE GOVERNMENT AND GOVERNMENT BOARDS AND COMMISSIONS

The rule of law which prevents the Crown from being sued in tort is one of the incidents of the principle represented by the maxim "The King can do no wrong". This well-known maxim had its origin at a time when the functions of governments did not include the many branches of administration and the innumerable undertakings which form a necessary part of administrative government to-day. The very conciseness of the maxim renders its application so general that, as the work of governments increased through the centuries, the ramifications of its application could not be foreseen and have not in all respects been desirable.

It is well recognized that governments, if entirely unprotected against legal actions, would be targets for avalanches of frivolous or vexatious litigation. Ample protection against unwarranted actions is, however, provided by requiring a fiat of the Crown as a condition precedent to the commencement of an action against the Crown or its agencies. This is generally the practice in those types of cases where actions may now be brought against the Crown. The Committee has studied the practice followed in Ontario in considering applications for fiats and is satisfied that fiats are not refused in proper cases.

It is a modern practice of governments to create boards and commissions which are charged with carrying on certain functions of government. Owing to the tendency of governments to extend their undertakings, some of these boards are authorized to conduct businesses which, while not usually in the past considered to be ordinary functions of a government, are rendered necessary by particular circumstances, and it is not the intention of this Committee to criticize any government for such practice. Some of the businesses which are carried on to-day by government boards and agencies include the operation of railways and other transportation facilities, the sale of liquor and the sale of electrical power and other commodities. Although many of these businesses are not operated in competition with private enterprises, the government, as represented by its boards and commissions, is carrying on business just as much as though the business were being conducted by a private individual, and the incidents of business which give rise to causes of action are present to the same extent.

There are of course exceptions to the general principles of law relating to actions against the Crown and against government boards and commissions. There is, for example, a provision in The Highway Improvement Act which permits actions to be brought for default in maintaining a highway in proper repair. The Hydro-Electric Negligence Act provides that actions may be brought against The Hydro-Electric Power Commission for damages arising in connection with the operation of any electric railway operated by the Commission. Provision is made in The Exchequer Court Act for the bringing of actions in tort against the Crown in the right of the Dominion in certain circumstances, and the Canadian National Railway Act permits actions to be brought without a fiat against the Canadian National Railway. For the purposes of this report it is unnecessary to refer further to the various exceptions to the general rule which exist to-day.

The Committee Therefore Recommends:

1. That provision be made to permit a subject to recover against the Crown in tort by way of petition of right provided that the fiat of the Lieutenant-Governor in Council is first obtained; and

2. That the Hydro-Electric Power Commission of Ontario, the Liquor Control Board of Ontario and the Temiskaming and Northern Ontario Railway Commission, which are in fact carrying on businesses, be placed in the same position as private individuals with respect to the right and liability to sue and be sued in the courts so that actions may be brought against them without the consent of the Attorney-General, but that the present rights of expropriation and other extraordinary rights enjoyed by them be not thereby interfered with.

APPEALS FROM BOARDS AND COMMISSIONS HAVING QUASI-JUDICIAL POWERS

The duties and functions of several boards and commissions, as well as the procedure followed by each of them, were studied by the Committee. It has not been suggested that those matters now dealt with by boards and commissions which were not previously determined by the courts should be the subject of appeals to the courts. Therefore it is not necessary under this heading to consider further the position of the Liquor Control Board. Nor do the activities and practice of the Industry and Labour Board, the Milk Control Board or the Farm Products Control Board come within the scope of this Committee's enquiry.

The expression of the view by the Committee that a study of the functioning of the Industry and Labour Board, the Milk Control Board and the Farm Products Control Board does not come within the scope of the Committee's enquiry, as these Boards do not deal with matters which formerly came before the courts, must not be taken as an indication that the Committee favours entrusting to such Boards the wide powers which they now possess or that the Committee either approves or disapproves of the manner in which the powers are being exercised. No evidence was heard in that regard. It may be that a study of the manner in which such Boards are exercising the powers vested in them by a body appointed for that purpose is warranted.

Ontario Municipal Board

The Ontario Municipal Board exercises powers under several statutes and while the procedure varies greatly under the various statutes, it would seem that although the decision of the Board is final upon questions of fact in all cases, there is invariably an appeal from the Board on questions of law. As the Board appears to be ideally equipped to study and make decisions on questions of fact, the Committee does not favour any change in the right of appeal from the Board.

The Board will be further referred to under the heading Appeals Under The Assessment Act.

The Committee heard comparatively little evidence concerning a right of appeal from the Workmen's Compensation Board and no representations were made to the Committee on the subject by any labour organization. References were made to it by a few witnesses who dealt with the subject more from an academic standpoint than from the standpoint of the actual operation of the Act. In all cases opposition to appeals on questions of fact was expressed. On the other hand some witnesses, notably the representative of the Ontario section of the Canadian Bar Association, advocated appeals on questions of law and principle. In view of the comparatively small amount of evidence heard the Committee is of the opinion that it should not make any recommendation on this point.

The Committee feels, however, that attention should be drawn to the social purpose of workmen's compensation and to the findings of previous commissions which have gone into the subject very much more extensively than the Committee has had the opportunity of doing. Almost since the establishment of the Workmen's Compensation Board some twenty-five years ago, suggestions have been made from time to time recommending appeals of various kinds from the Board. The following should indicate to those in favour of appeals in various forms that the present system and its workings should be the subject of very careful inquiry and consideration before any mode of appeal is introduced.

In considering any proposal for an appeal from the Board it is important to keep clearly in mind the purpose of the Board and not to lose sight of the fact that it is not a tribunal making rulings on questions between an injured workman and his employer. As Viscount Haldane has expressed it in Workmen's Compensation Board vs. Canadian Pacific Railway (1919), 48 D.L.R. 218, at p. 219:

> "The right of the workman does not . . . depend on negligence on the part of the employer, as in ordinary employers' liability . . . but arises from an insurance by the Board against fortuitous injury."

In Blatchford vs. Staddon, [1927] A.C. 486, Lord Blanesburgh describes workmen's compensation as "a compulsory system of mutual insurance throughout an industry at risk under it."

Idington, J., expressed himself in Dominion Canners vs. Costanza, [1923] S.C.R. 46, in the following language, at page 51:

> "The aim of the whole Act is to eliminate the litigious struggle and strife and judicial peculiarities in mode of thought and applying the law."

In the same case Duff, J. (now Sir Lyman Duff, Chief Justice of Canada) stated at page 54:

> "The autonomy of the Board is, I think, one of the central features of the system set up by The Workmen's Compensation Act. One at least of the more obvious advantages of this very practical method of dealing with the subject of compensation for industrial accidents is that the waste of energy and expense of legal proceedings and a canon of interpretation, governed in its application by refinement upon refinement, leading to uncertainty and perplexity in the application of the Act, are avoided."

The Meredith Commission. Whether or not there should be an appeal of any kind from the Board was a matter of careful and exhaustive study in 1913 by Sir William Meredith, a former Chief Justice of Ontario, whose investigation at that time covered the whole of Canada as well as the United States and Europe. Sir William considered it most undesirable that there should be an appeal from the Board. We quote from his report dated October 31st, 1913:

> "I think it would be a blot on the Act to have a right of appeal unless it can be shown there is danger in making the Board final."
>
> "One of the justifications for this law is to get rid of the nuisance of litigation, and I think even if injustice is done in a few cases it is better to have it done and have swift justice meted out to the great body of the men."
>
> "In my opinion it is most undesirable that there should be the appeal for which the draft Bill provides. A compensation law should, in my opinion, render it impossible for a wealthy employer to harass an employee by compelling him to litigate his claim in a court of law after he has established it to the satisfaction of a Board such as that which is to be constituted, and which will be probably quite as competent to reach a proper conclusion as to the matters involved, whether of fact or law, as a court of law."

The Middleton Commission. Subsequent attempts to incorporate a right of appeal into the Act, some of which reached the stage of being reduced to the form of a Bill to amend the Act, were abandoned because of opposition from both workmen and employers.

In 1931 the Honourable Mr. Justice Middleton was appointed a Commissioner to inquire into and report upon proposed amendments to The Workmen's Compensation Act and in his report, dated February 11th, 1932, he states, at pages 11 and 12:

> "There is almost unanimous agreement on the part of all concerned that the introduction of any right of appeal would be disastrous. I am satisfied that the workmen should be the last to complain of the existing conditions. . . ."
>
> "I do not recommend any change looking to either an appellate tribunal or to any of the various schemes for Boards of Review."

For the reasons previously given and in view of the small amount of evidence heard, the Committee feels that it is not in a position to make any recommendation with regard to appeals from the Workmen's Compensation Board.

Ontario Securities Commission

While the functions of the Ontario Securities Commission under the provisions of The Securities Act extend beyond the power to license persons engaged in the marketing of securities, the discretionary power which the Commission is most frequently called upon to exercise relates to the issue, suspension and cancellation of licenses of brokers and securities salesmen. Since the Commission was established in 1931 this power has been vested in a single commissioner.

In considering the position of the Ontario Securities Commission, the procedure in the office of the Superintendent of Insurance has afforded the Committee a helpful and suggestive analogy. The Superintendent of Insurance is vested with the power to issue licenses to insurance companies and insurance agents. In this case also the decision is that of a single official. The power of the Superintendent to issue and revoke licenses is contained in section 281 of The Insurance Act and the principles to be followed in issuing and revoking licenses are contained respectively in subsections 3 and 8 of Section 281. Under the same section an advisory board is established, consisting of a representative of the insurers, a representative of the agents and a representative of the Superintendent. This board advises the Superintendent regarding the issuance and cancellation of agents' licenses when requested by the Superintendent. As might be expected decisions of the Superintendent made on the advice of a board on which both branches of the insurance business are represented have proven acceptable to those engaged in the business.

The Committee favours the establishment of a similar Board of Review to function under The Securities Act. It is important that the different branches of the brokerage business be represented on the Board and it seems equally important that the Chairman of the Board should not be engaged in or connected with the brokerage business. In view of the frequent urgency of preventing the continuation of fraud, the Committee is of the opinion that the Commission should have the power to make an order suspending or cancelling a broker's or salesman's license to be effective as soon as it is made, subject to review of the Commission's order by the Board of Review within a specified period. It is desirable to have the members of the Board of Review appointed by the Attorney-General and not by the Commission.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That a Board of Review under The Securities Act of three members comprising,—

(*a*) a judge of a county or district court, as chairman;

(*b*) a licensed broker not being a member of a stock exchange; and

(*c*) the president of the Toronto Stock Exchange or some member of the Toronto Stock Exchange nominated by the President and approved by the Attorney-General,

be established, the judge and licensed broker to be appointed from time to time by the Attorney-General;

2. That, upon the application of a broker or salesman made within a specified period, the Board of Review have the power to affirm, rescind or vary any ruling or order of the Commission refusing to grant or suspending or cancelling a broker's or salesman's license after hearing such evidence as may be submitted; and

3. That where the Securities Commission refuses to grant, or suspends or cancels a broker's or salesman's license, the Commission be required

immediately to notify such broker or salesman, advising him that if he desires to have the matter reviewed by the Board he should so advise the Commission within a specified time; but that any such order or ruling of the Commission shall remain in full force and effect unless and until it is modified or rescinded by the Board of Review.

APPEALS FROM ORDERS ON MOTIONS TO QUASH INDICTMENTS

It appears to the committee that it would be advantageous to permit an immediate appeal from an order dismissing a motion to quash an indictment. If such an appeal were permitted it would undoubtedly prevent the loss of time and money in cases where, after the trial has taken place, the indictment is subsequently found to be defective by the Court of Appeal. However, it is important that any such right of appeal should not be permitted to be used as a means of delaying prosecutions, and the committee is of the opinion that the right to appeal to the Court of Appeal from an order dismissing a motion to quash an indictment should be dependent upon leave being first obtained from the trial Judge. The Committee is also of the opinion that an appeal by the Crown should lie to the Court of Appeal from an order quashing an indictment.

The Committee Therefore Recommends:

That an appeal should lie to the Court of Appeal from an order dismissing a motion to quash an indictment, before proceeding with the trial, upon leave being obtained from the Judge hearing the motion and that an appeal by the Crown should lie to the Court of Appeal from an order quashing an indictment.

APPEALS FROM SURROGATE COURTS

Appeal Tribunals

By section 29 of The Surrogate Courts Act, the matter of appeals from the judgments and orders of the Surrogate Court is dealt with as follows:

(1) Any party may appeal to the Court of Appeal from an order, determination or judgment of a surrogate court, in any matter or cause when the value of the property affected by such order, determination or judgment exceeds $200.

(2) A motion for a new trial after a trial by a jury shall be deemed an appeal.

(3) An appeal shall also lie to a judge of the Supreme Court from any order, decision or determination of the judge of a surrogate court, on the taking of accounts or upon an adjudication or to a claim or demand or as to the title to any property if the amount involved exceeds $200 in like manner as from the report of a Master under a reference directed by the Supreme Court.

The effect of the above quoted section is that an appeal lies to a single judge of the Supreme Court of Ontario from any order made by a surrogate court judge

on the passing of accounts or upon an adjudication as to a claim against an estate if the amount involved exceeds $200. A further right of appeal in such cases lies from the order of the single judge of the Supreme Court of Ontario to the Court of Appeal. On the other hand, as to such questions as the determination of the validity of a will and as to all matters which do not come within the language of subsection 3 of section 29, an appeal lies directly from the judgment of the surrogate court to the Court of Appeal when the value of the property affected by the judgment exceeds $200.

The Committee is of the opinion that the system of appeals provided for by section 29 of The Surrogate Courts Act is working satisfactorily and should not be interfered with.

Practice on Appeals

In the case of appeals coming within section 29 (3) of The Surrogate Courts Act, which are taken to a single judge of the Supreme Court in the first instance, the provisions of section 29 (3) must be read in conjunction with Rules 506 and 507 of the Consolidated Rules of Practice, 1928, which are as follows:

> 506. Every report or certificate of a Master shall be filed and shall be deemed to be confirmed at the expiration of fourteen days from the date of service of notice of filing the same, unless notice of appeal is served within that time.
>
> 507. An appeal from the report or certificate of a Master or Referee shall be to the Court upon seven clear days' notice, and shall be returnable within one month from the date of service of notice of filing of the report or certificate.

A practical difficulty arises in connection with the application of the language of Rules 506 and 507 to section 29 (3) of the Act, because the practice of service of a notice of filing of a report or certificate is not used in the surrogate court. This matter should be clarified and the time for appeal provided for in section 29 (3) should be made specific.

The Committee Therefore Recommends:

1. That the present system of appeals from judgments and orders of surrogate courts be continued; and

2. That the time for service of a notice of appeal from an order, decision or determination of a judge of a surrogate court under section 29 (3) of The Surrogate Courts Act be limited to 14 days from the date of the service of a copy of such order, decision or determination upon such persons as the judge of the surrogate court may direct, by prepaid registered mail or in such other manner as the judge may determine, and that such appeal be upon seven clear days' notice and be returnable within one month from the date of the service of a copy of such order, decision or determination.

APPEALS IN SUMMARY CONVICTION MATTERS

Except in the case of offences under The Liquor Control Act, appeals from summary convictions by magistrates under provincial statutes, as well as under

the Criminal Code, are by way of a trial *de novo* before a county court judge. On the other hand, both in civil and criminal matters, appeals to the Court of Appeal of Ontario are upon the record whether the appeal be from a decision of a judge of the Supreme Court or a judge of a county or district court or a magistrate. Because the practice of appeals on the record has proven satisfactory for many years, and because an appeal on the record usually occupies less of the appellate court's time and is less expensive than an appeal by way of trial *de novo*, appeals upon the record would appear to be preferable, all other things being equal. The practice of calling new and additional witnesses upon a trial *de novo* may also be considered to be an objectionable feature of that form of appeal for undoubtedly in some cases it reduces the hearing in the magistrate's court to something akin to an examination for discovery. An appeal by way of trial *de novo* has the further disadvantage of encouraging carelessness at the original trial because of the knowledge of the parties that the appeal will be by way of a new trial in the court appealed to.

While the Committee feels for these reasons that appeals by way of trials *de novo* should be abolished in summary conviction matters and that all appeals should be upon the record where a court reporter is present, nevertheless, as adequate and competent reporting is not always available, the Committee feels that it can make no such recommendation until this condition as to reporting is rectified.

However, if appeals by way of trials *de novo* are to remain, the Committee is of the opinion that on an appeal by way of trial *de novo* only those witnesses who gave evidence in the magistrate's court should be heard on the trial *de novo* unless the judge presiding at the trial *de novo* gives leave to call a new witness or witnesses on the following grounds:

(*a*) That at the time of the hearing in the magistrate's court the new witness was ill or out of Ontario or for any other sufficient reason was unable to attend the hearing in the magistrate's court, or

(*b*) That by the exercise of reasonable diligence the new witness whose evidence is offered could not be produced at the time of the hearing in the magistrate's court.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That when adequate and competent reporters in the magistrates' courts become uniformly available in the Province appeals by way of trial *de novo* should be abolished and appeals should be on the record; and

2. That until such time as adequate and competent reporters are uniformly available throughout the Province in the magistrates' courts appeals by way of trials *de novo* be retained, but that only those witnesses who gave evidence in the magistrate's court should be heard on the trial *de novo* unless the Judge presiding at the trial *de novo* gives leave to call a new witness on the following grounds:

(*a*) That at the time of the hearing in the magistrate's court the new witness was ill or out of Ontario or for any other sufficient reason was unable to attend the hearing in the magistrate's court; or

(*b*) That by the exercise of reasonable diligence the new witness whose evidence is offered could not be produced at the time of the hearing in the magistrate's court.

APPEALS UNDER THE ASSESSMENT ACT

Although several submissions were made relating to practices prevailing in connection with the making and altering of assessments as to real property, the Committee limits its recommendations to the practice governing appeals under The Assessment Act, being of opinion that the practice on assessment appeals is a matter properly coming within the scope of this investigation, while other matters relating to assessment which were the subject of submissions are not.

Under The Assessment Act an appeal lies from an order of the court of revision to a county or district judge. Subsection 1 of section 84 of The Assessment Act provides for a further limited right of appeal thus:

(1) Where a person is assessed to an amount aggregating in a municipality in territory without county organization $10,000 or upwards and in any other municipality $40,000 or upwards, an appeal shall lie from the decision of the judge to the Ontario Municipal Board, and any person who had appealed or was entitled to appeal from the court of revision to the judge or the municipal corporation, shall be entitled to make the appeal to the Board.

It is difficult to understand why an appeal to the Ontario Municipal Board should be permitted as to property in unorganized territory if the assessment is only $10,000, whereas no appeal lies as to property in territory having county organization unless the assessment aggregates $40,000. Both amounts were no doubt arbitrarily set in the first instance, and, while the Committee considers $10,000 to be a fair and reasonable amount in a municipality in territory without county organization, the figure of $40,000 is in the view of the Committee unreasonably high as to property in territory having county organization, considering the amount of taxes involved annually on an assessment falling far short of that amount.

Another feature involved in appeals to the Ontario Municipal Board under the present practice is that there is an original hearing before the court of revision and two hearings *de novo*, one before the county judge and another before the Ontario Municipal Board. If the parties desire to appeal directly to the Municipal Board from the court of revision there is no real advantage in requiring a hearing with the expense incidental thereto before the county judge. However, where parties desire to go before the county judge for reasons of convenience or otherwise, they should not be barred from doing so.

The Committee studied the right to and the form of appeal to the Court of Appeal and the powers of that court. Representations were made to the Committee that in addition to the right of appeal as to questions of law now existing an appeal should also lie to the Court of Appeal from orders of the Ontario Municipal Board on all questions of valuation within the jurisdiction of that court as to the amount involved. In the opinion of the Committee the Ontario Municipal Board is well able and has ample opportunity to study matters of

valuation and to arrive at proper conclusions thereon, and the view of the Committee is that the right of appeal to the Court of Appeal should remain as under the present law.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That in addition to or in lieu of the appeal from a court of revision to a county or district judge provided by section 76 of The Assessment Act, where a person is assessed to an amount aggregating in a municipality in territory without county organization $10,000 or upwards and in any other municipality $20,000 or upwards, an appeal shall lie from the court of revision to the Ontario Municipal Board at the instance and option of any of the persons mentioned in subsection 1 of section 76 of The Assessment Act against a decision of the court of revision or against any omission, neglect or refusal of the said court to hear or decide an appeal taken to it; and

2. That where a person is assessed to an amount aggregating in a municipality in territory without county organization $10,000 or upwards and in any other municipality $20,000 or upwards, and an appeal is taken to the county or district judge under section 76 of The Assessment Act, an appeal shall continue to lie from the decision of the judge to the Ontario Municipal Board.

ASSESSORS AND EXPERTS

The practice in the Admiralty Courts both in England and Canada of appointing nautical assessors is calculated to reduce the length of trials by eliminating the calling of expert witnesses. Where nautical assessors are appointed by order of the Admiralty Court neither of the parties is entitled to call experts or present the evidence of experts. In considering the advisability of permitting the appointment of assessors to the exclusion of expert witnesses in all civil cases, the Committee is not unaware of the fact that in New Brunswick this practice has recently been adopted in the civil courts and has been used for a short period in England in courts other than Admiralty Courts.

The appointment of nautical assessors appears to the Committee to be something which peculiarly lends itself to Admiralty Court problems where the questions involved invariably relate to the navigation of vessels. The nautical assessors appointed to assist the Admiralty Court in England, according to the information of the Committee, must be elder brethren of the ancient maritime society known as "The Corporation of the Trinity House of Deptford Strond" and there would be infinitely less opportunity for a divergence of views on the part of different nautical assessors in Admiralty cases than there would be between the opinions of experts in civil courts where matters of medical science, engineering and other sciences are frequently involved. In most cases involving expert testimony in the Ontario courts there would be considerable difficulty in having the parties agree upon a satisfactory independent expert because usually there are different schools of thought among the experts who would be qualified. There is in the present law nothing to prevent the parties from agreeing upon a single expert, but this is not often done. The Committee does not favour any proposal which would permit the court arbitrarily to appoint an expert

who had not been approved by all the parties since it has been so often demonstrated that men prominent in the same branch of science entertain views on a single point which are diametrically opposed.

Further, while constitutional difficulties are not insurmountable, it is not only important that the judge make his own decisions, but it is also desirable to have him sitting alone on the Bench making his decisions on the facts which he obtains from witnesses both lay and expert with the assistance of counsel representing all parties affected. While in the great majority of cases our judges would undoubtedly form their own decisions, the Committee does not favour any step which might tend to result in experts making decisions for judges.

THE COMMITTEE THEREFORE RECOMMENDS:

That a practice similar to that in the Admiralty Court relating to assessors be not adopted in any of the other courts of Ontario.

BAILIFFS

SUPERVISION

There are two types of bailiffs in the Province. First, there are bailiffs who are appointed by the Lieutenant-Governor under The Division Courts Act and, secondly, there are those who act under various Provincial statutes or as agents of landlords and conditional vendors of chattels.

Division court bailiffs are under the supervision of the Inspector of Legal Offices of Ontario, and are dealt with in this report under the heading DIVISION COURTS. There is, however, no supervision over bailiffs acting under The Landlord and Tenant Act and the various other Provincial statutes. Although municipalities may by by-law require bailiffs to be licensed and some municipalities have passed such by-laws, the licensing by municipalities does not involve any control over or assurance of the qualifications of bailiffs so licensed.

Many of the duties performed by bailiffs are of a technical nature requiring some knowledge of procedure and of the provisions of the statute under which the bailiff is acting. Some supervision of persons acting as bailiffs is, in the opinion of the Committee, most desirable in the public interest.

COSTS OF DISTRESS ACT

In many respects the services performed by bailiffs for which the fees are prescribed under The Costs of Distress Act are similar to the services performed by division court bailiffs under The Division Courts Act. The tariffs applicable to bailiffs under The Division Courts Act are more complete and appear to be reasonable. For the purpose of uniformity the Committee favours a revision of the tariffs under The Costs of Distress Act to render them the same, so far as possible, as those under The Division Courts Act.

LANDLORD AND TENANT

A practice has grown up in the levying of distresses for arrears of rent whereby the bailiff, after distraining the goods and chattels, takes a bond from the tenant which purports to permit the bailiff to withdraw from close possession of the

goods and chattels, at the same time retaining all rights existing under the distress warrant against the goods and chattels wherever they may be moved with full authority to retake possession at any time. Such a practice has the advantage of eliminating the necessity of removing chattels from the premises or of placing a man in possession, and consequently effectively reduces the expense of the proceedings for all parties concerned. It appears, however, to be a procedure which has developed without statutory authority. As it has become almost a standard practice with very desirable features it should be made regular and legal.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That any person acting as a bailiff, except under The Division Courts Act be required to comply with the following provisions,—

(*a*) He shall not act as bailiff until the judge of the county or district court of the county or district in which he carries on business has certified to the clerk of such court that, after due examination, he has found such person to be qualified to act as a bailiff.

(*b*) The clerk of such court shall file such certificate of the judge and shall thereupon issue a certificate of qualification to such person.

(*c*) No renewal of any such certificate issued by the clerk shall be required, but every such certificate shall be subject to cancellation at any time at the direction of any county or district court judge;

2. That the tariffs under The Costs of Distress Act be revised so as to make applicable thereto the same fees, so far as possible, as under The Division Courts Act and that such tariffs of fees be prescribed by the Lieutenant-Governor in Council as is the case under most other statutes; and

3. That The Landlord and Tenant Act be amended to permit a bailiff who has distrained for arrears of rent to take a bond so that he may withdraw from close possession without relinquishing any rights.

CENTRAL PLACE OF EXECUTION

At various times in the past representations have been made recommending the establishment of a central place for the executing of all sentences of death imposed in the Province.

The advantages to be gained by the adoption of a central place of execution are negligible. The cost of a scaffold, in those counties and districts where no permanent scaffold exists, ranges from $30 to $100. On the basis of the number of executions carried out in Ontario in the past few years the saving on this account would not exceed $300 or $400 a year at most, and this would be offset by the cost of moving prisoners. No other financial saving would be effected. It would be inadvisable to have an official executioner otherwise employed in any prison or other institution containing a central place of execution because such a situation would be detrimental to the morale of the prisoners. The naming of a central place for the carrying out of death sentences would not

therefore enable the authorities to use an official executioner at other work and thus render his employment permanent and make him available for carrying out all executions, as has been suggested. Nor is it advisable to name any one community as a place in which all executions in the Province should be carried out and thus to saddle that community with all the emotional incidents thereof.

On the other hand there may be advantages in holding an execution in the county or district where the crime was committed. In a province the size of Ontario it is desirable that the relatives of the person to be executed should not be required to travel long distances to reach the place where their unfortunate relative is held prior to the execution. There must be considered also the danger of escape from custody in moving prisoners to a central place of execution.

THE COMMITTEE THEREFORE RECOMMENDS:

That no action be taken with regard to the establishment of a central place for executing sentences of death.

CLERKS OF THE PEACE

Duties are imposed upon the clerk of the peace by several statutes. He performs functions under the Criminal Code and the Naturalization Act (Canada) as well as under some fourteen provincial statutes. Throughout the Province, except in the County of York, the clerk of the peace is also the Crown attorney for the county or district. This means that, with the exception of the County of York, the one official must perform the functions of Crown counsel and court clerk in the county court judges' criminal court and in the court of general sessions of the peace. Such a practice is not conducive to the dignity of the court or the respect to which the office of Crown attorney is entitled.

There appears to be no reason why the county court clerk should not be required to act as clerk of these two courts. However, as it is important to retain the system of filings and preliminary procedure which now obtains in these courts, the clerk of the county or district court should perform only such duties of the clerk of the peace as are actually performed in the court room.

THE COMMITTEE THEREFORE RECOMMENDS:

That (except in the County of York) the clerk of the county or district court be required to perform those duties which the clerk of the peace is now required to perform in the court room, in his capacity as clerk of the peace, during the sittings of the court of general sessions of the peace and the county or district court judges' criminal court.

CONSOLIDATION OF COURTS

Consolidation of certain of the inferior courts of the Province has been suggested. The proposal would include the county and district courts, the surrogate courts, the courts of general sessions of the peace and the county and district court judges' criminal courts. Advantages would include a reduction in the number of courts in the Province and convenience to the public by reducing

the number of court offices. However, as there has been what might be termed a *de facto* consolidation in many counties and districts these advantages have already been partially attained. Although the number of types of books of account would be reduced, the actual saving in books of record, books of account and other items of expense would be small.

While consolidation is desirable, the advantages to be gained do not warrant such a scheme being put into effect at this time, having regard to the great many amendments to statutes and rules of court which would be involved.

THE COMMITTEE THEREFORE RECOMMENDS:

That consolidation of inferior courts be not proceeded with at this time but that hereafter in amending the statutes and rules of court regard should be had to the possibility of consolidation at some future time.

COUNTY COURT DISTRICTS

Prior to 1919 in Ontario the expenses involved in the interchange of county judges had to be approved by the Attorney-General. This is still the practice in the other provinces. However, under an Ontario enactment of 1919 county and district court districts were erected and an unrestricted interchange of judges within the respective districts was provided for in all classes of work under both Provincial and Dominion statutes.

The Committee has thoroughly considered the situation and finds that while there are many advantages in the system of judicial districts as set up in this Province in 1919, there have been extensions in the matter of exchanges which were apparently not contemplated at the time the legislation was introduced, and which the Committee does not regard as desirable. In this connection the Committee refers to the following types of matters as to which the interchange of judges in the districts has become common practice and which the Committee does not regard as desirable or necessary—revision of voters' lists, appeals under The Assessment Act, and division court sittings.

The Dominion Department of Justice has ruled that in the future the Dominion will not pay the expenses involved in the interchange of judges for division courts exclusively. Therefore the Province would have to pay such expenses and the Committee approves the action of the Attorney-General in advising the Dominion Department of Justice that it is not the intention of the Province to pay such expenses. No doubt the Dominion Department of Justice will advise the county and district judges that expenses involved in interchange for division courts only will not be paid.

THE COMMITTEE THEREFORE RECOMMENDS:

That the provisions of The County Judges Act relating to county court districts be limited in their application to county courts, both jury and non-jury, courts of general sessions of the peace and county court judges' criminal courts.

COUNTY COURT PRACTICE

General

Although the jurisdiction of the county courts is subject to very definite limitations, their practice is governed by the same rules as those of the Supreme Court. This means that the machinery of examinations for discovery, interlocutory motions and other proceedings necessary to enable the facts to be brought out and understood in involved cases in the Supreme Court is available in county court actions. This situation not only permits proceedings in county court actions to become unduly complicated and tends to delay trial but also substantially increases the costs of the litigants. Mr. Justice Middleton, whose knowledge and experience in matters of practice are well known, strongly advocated to the Committee that a simplified procedure adapted to the type of cases tried in county and district courts be made applicable to those courts. The Committee concurs in the recommendation of the learned Justice of Appeal. The working out of a simpler procedure with the many problems involved is, however, a work requiring much time and opportunity for study which are not available to this Committee.

Signing of Orders

The practice of having county court judges sign orders which they make while the clerk may sign judgments of the county court is general throughout the counties and districts of Ontario. If a county court clerk is competent to sign a judgment of the court he should be competent to sign an order of a judge of the same court. The present practice seems to have grown up because of the fact that while the county court clerk has in his office an accurate record of judgments there is no provision which ensures that he will have any record of an order made by a judge. The judge of the court is in most cases regularly engaged in court, either in his own county or in another county of the county court district. To require the signature of the judge upon all county court orders is a matter of inconvenience to litigants with no compensating advantage.

Appeals from Interlocutory Orders

It has been suggested that an appeal should be permitted from an interlocutory order in a proceeding in the county court. The Committee is of opinion that there is a real need for simplification of procedure in the county court and that to permit an appeal from an interlocutory order would be undesirable since it would render procedure in the court more involved.

The Committee Therefore Recommends:

1. That consideration be given to simplifying the practice and procedure in the county and district courts by the body which is responsible for the making of rules of practice for those courts;

2. That provision be made that where a judge of a county or district court makes an order he shall make an endorsement thereof upon the notice of motion and that the clerk of the court shall sign the formal order; and

3. That no appeal be permitted from an interlocutory order in proceedings in a county or district court.

COURT CRIERS

Although the office of court crier is very old it has ceased to serve any real purpose. The duties which are performed by the court crier might very well be performed by the clerk of the court, the sheriff or a sheriff's officer or by one of the constables. In any event there is no necessity for having a separate official present in court for that purpose. In most of the courts of England the office of court crier was abolished many years ago and his work is now performed by other officials.

The Committee Therefore Recommends:

That the office of court crier be abolished by providing that upon the retirement from office for any reason of any person now holding the office of court crier no appointment shall be made in his place. For this purpose amendments should be made to the section of The Sheriffs Act which provides for the appointment of court criers, as well as to one of the schedules to The Administration of Justice Expenses Act. The statute should also prescribe which officer shall perform the functions of the court crier.

DESIGNATION OF SPECIAL JUDGES TO SPECIAL CASES

It has been suggested that in the Supreme Court special judges should be designated to hear commercial causes, as has been the practice in England for many years, and that a similar practice be adopted with regard to matrimonial causes. While such a practice might be advantageous in some jurisdictions, it is not adaptable to this Province, in the opinion of the Committee, because of the geography and population of Ontario, and considering the number of cases which are usually heard at each sitting of the Court. As one witness stated, "It is not yet practical in this country," and certainly it would cause an unnecessary and undesirable amount of travel on the part of the judges in many instances, having regard to the number of cases and the distances involved. Furthermore, there does not appear to be any real need for the adoption of such a system.

The Committee Therefore Recommends:

That, apart from the present practice of assigning one judge to bankruptcy matters, the practice of designating special judges to deal with commercial causes, matrimonial causes or other special types of causes be not adopted.

DIVISION COURTS

Generally

During the proceedings before the Committee it became apparent that the division court system is open to two main objections, namely, the amount of the costs and the difficulty of recovery after judgment. The Act has also been criticized as being unreasonably long and complicated. When it is considered that the Act, exclusive of forms, occupies less than 70 pages and contains, in addition to matters relating to practice and procedure both before and after judgment, all provisions relating to the establishment of the courts, the inspec-

tion of the courts and provisions relating to judges, clerks and bailiffs, as well as sections prescribing the jurisdiction of the courts, special provisions applicable to partnership, evidence, appeals, absconding debtors, claims of landlords and other matters, the length of the Act does not appear unreasonable, nor can the procedural provisions, with certain exceptions, be termed unduly complicated. While the statement has been made that The Division Courts Act should be shortened and simplified, this is not an easy matter in view of the great number of aspects of division court constitution, practice and procedure, which must necessarily be dealt with in The Division Courts Act and the regulations made under it.

Service of Process

The practice of having all summonses served by a court official is peculiar to the division courts. In the higher courts service may be effected by any person whether or not he is an official of the Court.

Service by post is dealt with more fully in another part of this report and in a general way the observations therein contained are applicable to division court matters. One of the principal items of expense in connection with the prosecution of division court claims is the bailiff's fees for serving process. Service by registered mail has proven satisfactory in England, although the safeguard applicable in that jurisdiction, and discussed in another part of this report, must be borne in mind. Service by registered post has proven satisfactory in many of the States of the Union and service by ordinary post is working well in at least one jurisdiction. Because of the apparent success with which service by post has met in other jurisdictions and because of the public demand for a reduction in division court costs the Committee is disposed to recommend the adoption of service by such means in the division court. The Committee is, however, inclined to the view that service by mail in the division courts should be effected by a preferred type of mail so as to ensure, as far as possible, the receipt of the summons or other document by the addressee. The Committee is also of opinion that services by post in division court matters should be attended to by the clerk of the court. This will permit the clerk to keep a record of proofs of service as received by him and will enable him to arrange his court lists accordingly. Ample safeguarding facilities may be created by empowering a trial judge to require personal service where he considers such action warranted. In view of the practice in the higher courts, the Committee sees no reason why personal service should not, at the option of a party to an action, be effected by party or his agent, provided there is proper proof of service.

Court Costs

Objections to the present system of court costs in the division courts are twofold. In addition to the complaint that the costs are excessive, objection has also been taken to the fact that a litigant is never sure at the outset of a case either how much the costs will amount to before judgment or how much they will be by the time judgment has been enforced. Because of the uncertainty and difficulty of enforcing judgment, the Committee is satisfied that it is impossible to devise any system of costs which would take care of proceedings after judgment with any certainty as to the amount of costs involved. However, it is not only desirable but practicable to devise what might be termed a block system of costs to include all proceedings up to and including judgment. In

determining the amounts of costs which should be paid under such a system it would no doubt be necessary to have regard to average amounts involved in prosecuting a suit to judgment or arriving at a settlement before judgment under the present plan, making appropriate divisions according to the amounts claimed in each suit. If such a calculation is to be the basis for arriving at the amounts of fees payable under a block system, no rebates or other allowances could properly be made where the case is settled before judgment. If rebates and other similar allowances were barred the rates could be kept to a minimum. If service is to be effected by prepaid registered mail and the mailing is to be done by the court clerk, postage should also be included in the block tariff. If, however, service by the bailiff as under the present system is to be continued, it would not be feasible to include costs of service in the block tariff for this amount varies greatly in the rural and urban districts. In the northern parts of Ontario particularly, where long distances are involved, the costs of service are much greater than in the more densely populated sections of the Province.

Jurisdiction after Judgment

Where judgment has been recovered in a division court it is often necessary to realize upon it in some other part of the same county. The practice of issuing a transcript to a court of another division is one of the matters which increases costs in division court proceedings. As has so often been observed, with modern means of transportation and communication distances have greatly diminished and consequently it is a matter of no great inconvenience to a bailiff of a division court to travel to another part of the same county. The Committee sees no advantage in continuing the present practice which necessitates the issue of transcript from one division court to another division court in the same county or district.

Extra County Jurisdiction

Because of the arbitrary nature of boundaries of county and provisional judicial districts it is often more convenient for a person residing in one county or district to attend a division court located in the next county or district than to attend a division court located in the county or district in which he resides. The Division Courts Act, however, does not make provision for giving jurisdiction to a division court in more than one county or district. There are many cases in the Province where such a provision would work to the advantage and convenience of many people.

If this recommendation and the next preceding recommendation are embodied in legislation, consideration should be given to the jurisdiction after judgment of a court whose district includes parts of two counties.

Appeals

In cases involving over $100 an appeal from a division court may be taken to the Court of Appeal where three judges sit on the appeal. Substantially the same rules apply to division court appeals as are applicable to appeals from the county court and the Supreme Court where much larger amounts are involved. An appellant is required to furnish three copies of the transcript of evidence and three copies of an appeal book containing the notice of appeal, the pleadings, the formal judgment, reasons for judgment, if any, and exhibits. These matters

render the cost of a division court appeal substantial. The situation might be remedied to some extent by providing for an appeal to a single judge of the Supreme Court. Judges and lawyers appearing before the Committee whose opinions were sought regarding such a change in procedure were practically unanimous in approving of an appeal from the division court to a single judge of the Supreme Court. Owing to the congestion of the lists in weekly court and chambers it is not desirable to require any further matters to be adjudicated in those courts, nor does the Committee consider that it is necessary or desirable to alter the tribunal to which an appeal from a division court is taken. Therefore the Committee is of the opinion that appeals from the division courts should be heard and disposed of by a single judge of the Court of Appeal.

Juries

The Division Courts Act provides for a trial by jury in all actions where the amount sought to be recovered exceeds $50. In order to provide a fund to cover the cost of jury trials another section of the Act requires that there shall be paid to the clerk, on every action originally entered in his court, in addition to all costs or jury fees payable,—

(*a*) where the claim exceeds $20 but does not exceed $60—three cents;

(*b*) where the claim exceeds $60, but does not exceed $100—six cents; and

(*c*) where the claim exceeds $100—twenty-five cents.

Judge Morson, who for more than forty years presided over division courts in the County of York, estimates that he tried 320,000 cases in the division courts during that time out of which not more than 25 were tried by juries. Mr. McDonagh, who is clerk of the First Division Court of the County of York, which is one of the busiest courts in the Province, estimates that during the last six years approximately 42,000 actions have been entered and that there have not been more than 12 jury trials. These figures indicate that the number of jury trials in division courts does not warrant provision for trial by jury being retained in the Act, and that substantial sums of money must have accumulated in many of the counties in what is known as the division court jury fund. The Act requires the clerk to pay over to the county treasurer all moneys received by him as jury fees. Jury fees are not payable in provisional judicial districts.

Report upon Trial List

Many of the division courts are in outlying parts of the Province and owing to the lack of facilities for communication it is sometimes difficult for a judge to ascertain whether there are any cases to be tried on the date set for a sittings of the court. Where there are no cases for trial it is important that the expenses of the administration of justice should not be unnecessarily increased by having the judge travel to the court.

Garnishee and Attachment

For many years proceedings by way of garnishee in the division court have been a source of complaint. Not only does the proceeding increase the expense of

division court procedure but it is a matter of inconvenience to the creditor, the debtor and the debtor's employer for under the established practice a garnishee order may be made only against moneys that are due and payable to the debtor. Accordingly if wages are to be garnished from time to time a new order must be taken out and served each time wages become due. This brief description of the present practice will serve to indicate both the inconvenience and expense which are involved. In the Provinces of Quebec and Manitoba statutes have been passed with a view to assisting debtors who are indebted to more than one person and providing machinery for discharging the debts over periods of time. In Quebec the legislation is known as the Lacombe Law. It is contained in articles 698a and 698h of the Civil Code of Quebec which were passed in 1939 to replace article 1143. The law may be invoked by a debtor having several creditors provided that at least one judgment has been signed against him. He must file a declaration with the court clerk stating his salary, the debt upon which he is paying, his employer's name and other particulars. He is required to pay into court that part of his wages which is not exempt from seizure, within three days of each pay day.

The Lacombe Law is administered by the clerks of the Circuit Court in Montreal and the Magistrates' Courts in the other parts of the province. While these are the small debts courts of the province, the Lacombe Law applies equally to claims of all amounts and to a judgment of any court in the province. Where a debtor brings himself under the Lacombe Law by filing a declaration and then fulfills the requirement of the law by making regular payments into court on the seizable portion of his wages, no proceedings by way of garnishee or attachment may be taken against his wages.

The Manitoba legislation is known as The Orderly Payment of Debts Act, and was first passed in 1932. Having outlined the Lacombe Law, the Manitoba legislation may be conveniently described by indicating the chief respects in which it differs from the Lacombe Law:

(1) While the Lacombe Law applies only to wages, The Orderly Payment of Debts Act applies to all moneys owing to the debtor;

(2) Whereas under the Lacombe Law in Quebec the amount of wages exempt from execution is fixed by statute, under The Orderly Payment of Debts Act the amounts payable into court by the debtor are either agreed upon by the debtor and the creditors, or failing that, are fixed by the court;

(3) Under the Lacombe Law the employer is not brought into the picture at all, the moneys being paid into court by the debtor. This is not necessarily so under The Orderly Payment of Debts Act for under that Act the clerk may at any time require of and take from the debtor an assignment of any moneys due, owing or payable, or to become due, owing or payable to the debtor and unless otherwise agreed upon, he shall forthwith notify the person owing or about to owe the moneys of the assignment; and

(4) The Lacombe Law applies to all claims regardless of the amounts involved while The Orderly Payment of Debts Act does not apply to a claim for which an action may not be maintained in a county court and does not apply to a judgment in an amount exceeding that for which action may be brought in the county court (approximately $800) unless the creditor consents.

It should be observed that both the Quebec and Manitoba Acts have the common and desirable feature that the invoking of the provisions of the Act is entirely at the option of the debtor.

It was brought to the attention of the Committee that a practice in some respects similar to the practice under the Lacombe Law and The Orderly Payment of Debts Act has grown up in some parts of Ontario. Some seventeen collection agencies in the Province are now carrying on a practice that is commonly known as "pooled accounts". Under this system the debtor pays a portion of his wages to the collection agency and the collection agency distributes the amounts paid in among the creditors of the debtor. The charge, known as an "agency charge", for handling the debtor's accounts in this way, varies from 7% to 20% among the various agencies. However, where a collection agency has been authorized by a creditor to collect a debt from a debtor who has pooled his accounts with the agency, it charges that creditor its regular collection fee which varies throughout the Province from 15% to 37%. According to information furnished to the Committee, under this system a collection agency in some cases retains as much as 47% of moneys collected by it from a debtor and which would otherwise be payable to a creditor.

Before establishing any new procedure in the courts similar in nature to the Lacombe Law or The Orderly Payment of Debts Act, the cost of administration is an item which must be carefully considered. The Attorney-General for Quebec was kind enough to arrange for the attendance of Mr. P. A. Juneau, K.C., a Special Law Officer of his Department, to attend before the Committee and clarify many points relating to the administration and operation of the Lacombe Law. Mr. Juneau explained to the Committee that the fee for filing a declaration under the Lacombe Law is very small, being from 50 cents to $1.00. There is also a fee of a similar amount payable by a creditor filing a claim. The court, however, retains 2% of all moneys paid in when distribution is made. It is estimated that in the district of Montreal it costs the province $15,000 annually to maintain the system. A simplification of administrative features would substantially reduce the cost of maintaining the system and a sufficient percentage retained by the court would meet the expense involved. Mr. Juneau stated, "Instead of charging for any declaration and charging for filing any claim, I would suggest that when the debtor has deposited $50, before the distribution of his $50, we would charge $2.50, 5%, and in the end $1.25 would be charged to him and the other $1.25 would be charged to the creditor." In Manitoba the fee system appears to be the practice. The Committee is of opinion that to make such a system self-sustaining and in fairness to those affected by it, the retention by the clerk of a percentage of the amounts paid into court is preferable to the fee system. The Committee also expresses the view, having in mind the benefit accruing to creditors by the facilitation of collections effected by this system, that it is not unreasonable to require the creditor to pay one-half of the prescribed fee. In view of Mr. Juneau's suggestion, the Committee favours a charge of 5% upon the establishment of the system and if experience shows that such a charge is inadequate to cover expenses or exceeds that which is actually required the charge may be increased or reduced. The charge made should be no greater than is required to maintain the system.

In considering the scope of such a law it is felt that it would best serve its purpose by being limited to judgments of division courts or claims within the

jurisdiction of a division court. To make it applicable to claims for much larger amounts and then to make distribution on a *pro rata* basis would deprive a creditor having a small claim from any substantial benefit from the amounts collected. The Committee would also limit the law to wages. Such a law is particularly applicable to wages as it provides for the payment of debts on a deferred basis. This provision would mean that individual creditors could take such proceedings as they might deem desirable against other funds of the debtor regardless of the amount of their claims. The Committee would place the administration of the law in the hands of the division court clerks.

The Division Courts Act permits garnishment of a debt "owing or accruing" to a debtor. Whatever may have been the intention of the Legislature, decisions of the courts have rendered the word "accruing", as it is used in this provision, meaningless. The net result of the present practice is to embarrass and inconvenience the creditor in the collection of his debt by requiring him to act after a debt has become due and before it has been paid over, which requirement, particularly in the case of wages, is often difficult of accomplishment. The Committee favours the extension of the section so as to permit garnishment where a debt, though not yet due and payable, may properly be described as accruing due.

Rules, Forms and Tariffs

In another part of this report where rule-making authorities are dealt with, the recommendation that a special rule-making body should have authority to make all rules relating to court procedure is subject to a specific exception with regard to rules in division courts. The reason for the exception is that the practice and procedure in the division courts differ from that in the other courts in many respects, the procedure being as informal as is practicable. Since the abolition of the Board of County Judges the Lieutenant-Governor in Council has had the authority to make rules governing any matter relating to practice and procedure of the division courts, or other similar matters, and to prescribe fees payable to the clerk and bailiff. Any forms which are prescribed in The Division Courts Act are contained in a schedule to the Act. This practice which in modern legislation is the exception rather than the rule tends to extend the length of the Act. Further, it is often found that forms require to be altered to meet particular situations which were not anticipated when the forms were prepared. For these reasons it is advisable that the power of the Lieutenant-Governor in Council to prescribe rules and fees be extended to include the prescribing of forms.

Third Party Procedure

Section 89 of The Division Courts Act permits any person who ought to have been joined in an action or whose presence is necessary to enable the judge effectually and completely to adjudicate upon the questions involved in the action to be added as plaintiff, defendant or garnishee. There is one situation which is not covered, however, and that is the adding of a third party. Not uncommonly in division court practice it is desirable to have some person added as a third party, a practice recognized in both the county courts and in the Supreme Court, in order that all issues may be settled in the one action. As there is no provision for this procedure in The Division Courts Act or rules it is necessary to bring a separate action against the third party. Arrangements are often made to have both actions tried together. As the "third party" and the plaintiff are not parties to the same action the situation is unsatisfactory.

Interpleader

A practice has developed where a judgment summons or interpleader is issued, to enter it in the books as a separate action. There appears to be no authority for the practice nor is there, in the opinion of the Committee, any good and sufficient reason why this should be the case. Under the practice as it exists a second and separate deposit of costs must be made and as the various items which have been charged for in the original action are again charged against the second deposit, the costs become exhorbitant.

Executions

The Division Courts Act places restrictions upon execution against land on a division court judgment. It provides that "where an execution against goods is returned *nulla bona*, and the sum remaining unsatisfied on the judgment amounts to the sum of $40 or upwards, the judgment creditor shall be entitled to an execution against the land of the judgment debtor." The Committee would not interfere with the minimum amount of $40 fixed by the statute. In many cases, however, the judgment creditor or the clerk of the court knows that the issuing of execution against the goods of a debtor is an abortive gesture. In such cases the requirement that execution must be first issued against goods serves no other purpose than to add costs to those already incurred. Whether the creditor should be entitled as of right to issue execution against lands where the amount involved exceeds $40 or whether he should be required to file an affidavit deposing that the debtor has no goods which are subject to execution has been given some consideration by the Committee. It is only reasonable that judgment creditors in the division courts should have the same remedies for realizing upon their judgments as is the case in other courts, and particularly so because of the substantial increase in the jurisdiction of division courts a few years ago. In addition while a creditor may be reasonably certain that the debtor is not possessed of any seizable goods he may not be in possession of such facts as would permit him to take an affidavit to that effect. The Committee does not feel that it is necessary or desirable to require a creditor to take such an affidavit before being entitled to issue execution against lands.

Appointment of Clerks and Bailiffs

Under the heading Bailiffs the Committee recommends that every bailiff other than one engaged exclusively in division court work, be required to obtain a certificate from the local county or district court clerk that the judge of the court has approved of his qualifications to act as a bailiff. Under existing law the certificate of a judge that any person, other than a barrister or solicitor, desirous of being appointed a notary public is qualified for the position, is necessary before such person can be so appointed.

Because of the large number of division courts in the Province the appointment of division court clerks and bailiffs who are competent to perform the work of their respective offices has long been a problem. In the interests and for the convenience of the public it is important that where a vacancy occurs in the office of clerk or bailiff an appointment be made without undue delay. Having regard to distances involved and the pressure of other work it is not always possible for the proper officers of the Attorney-General's Department to

study the situation and make full inquiry as to the ability of the applicants. As the local judge is ideally situated and equipped to examine and report upon persons who are considered for appointment as clerk or bailiff, the Committee favours having such a judge examine and report whether a person is qualified for the office of clerk or bailiff before he is appointed. This practice would be substantially the same as the present law and practice with regard to notaries public.

THE COMMITTEE THEREFORE RECOMMENDS:

SERVICE OF PROCESS

1. That,

(*a*) service of process in division courts be effected by prepaid registered mail with a return receipt card (subject to provisions of clauses (*c*) and (*e*) hereof);

(*b*) the mailing of process should be done by the division court clerk;

(*c*) if the court is not satisfied that service by mail has been effected in any particular case, the court may require that personal service be effected;

(*d*) where personal service is ordered by the court the party on whose behalf the service is to be made may effect service himself or by his representative, in which case the cost of service shall be in the discretion of the court;

(*e*) in lieu of the form of service indicated in clause (*a*) above, a party may, if he so desires, effect personal service either himself or by his representative, but at his own expense; and

(*f*) where a party elects to make personal service himself or by his representative, or where personal service is required by the court, in cases where the amount does not involve more than $30 the provisions of section 79 of The Division Court Act shall continue to apply.

COURT COSTS

2. That a block system of costs in division courts covering all proceedings up to judgment be established and that the costs of service by prepaid registered mail with a return receipt card be included in the amount required under the block system.

JURISDICTION AFTER JUDGMENT

3. That after a claim has been reduced to judgment the division court in which judgment has been obtained shall have jurisdiction throughout the county or district and that division court bailiffs shall have authority to act in respect of any judgment throughout the county or district in which their court is located, provided that where a bailiff goes outside his own division he shall not be permitted to recover mileage for any travelling outside his division.

Extra County Jurisdiction

4. That The Division Courts Act be amended to allow the Lieutenant-Governor in Council to give a division court located in one county or district jurisdiction in part of an adjoining county or district.

Appeals

5. That provision be made for the taking of appeals from division courts to a single judge of the Court of Appeal.

Juries

6. That juries in division courts and jury fees be abolished.

Report upon Trial List

7. That where there are no cases to be tried at any sittings of a division court the clerk of the court be required so to advise the judge, and if the clerk has not mailed a notification to the judge which would in the ordinary course of mail reach its destination at least twenty-four hours before the time for the sittings of the court in the case of a county, and at least forty-eight hours before the time for the sittings of the court in the case of a district, the clerk be required so to notify the judge by telephone or telegraph at least twenty-four hours in the case of a county and at least forty-eight hours in the case of a district, prior to the time set for the sittings of the court.

Garnishee and Attachment

8.—(*a*) That a law similar to The Orderly Payment of Debts Act of Manitoba be adopted in Ontario subject to the following:

(i) That the operation of the law be limited as in the Lacombe Law in Quebec to wages of the debtor;

(ii) That all judgments of division courts or claims which are within the jurisdiction of a division court may be brought under such law where it is invoked by the debtor;

(iii) That no fees be charged for the filing of a declaration by a debtor bringing himself under the law, and that 5% be deducted upon distribution of moneys, such percentage to be subject to increase or decrease in the light of experience so that the charge may be made commensurate with the costs of administration of the law, and that one-half of the amount charged be payable by the debtor and one-half by the creditor; and

(iv) That the law be administered by the division court clerks who shall be required to keep a record of all the debtors in their respective divisions who have brought themselves within the provisions of the Act; and

(*b*) That the garnishment provisions of The Division Courts Act be made applicable to debts which although not yet due and payable, may be described as "accruing due."

Rules, Forms and Tariffs

9. That the provisions authorizing the Lieutenant-Governor in Council to make rules and prescribe fees be extended to authorize the Lieutenant-Governor to prescribe forms.

Third Party Procedure

10. That provision be made for the joining of third parties in division court actions.

Interpleader

11. That proceedings by way of judgment summons and interpleader, or other matters arising out of a division court action be dealt with by the clerk of the court as part of the same action.

Executions

12. That where the sum remaining unsatisfied under a division court judgment amounts to $40 or more execution may be issued against the lands of the judgment debtor without execution against goods returned *nulla bona* being first required.

Appointment of Clerks and Bailiffs

13. That no person be appointed a division court clerk or bailiff unless the judge of the county or district court of the county or district where the division court is located has certified that he has examined such person and finds him to be qualified to perform the duties of a division court clerk or bailiff, as the case may be.

ENLARGEMENT OF POWERS OF COURT OF APPEAL

The power of the Court of Appeal with regard to an appeal from a judgment based upon the verdict of a jury is concisely stated in Volume 3 of the Canadian Encyclopedic Digest (Ontario) at page 151:

> "The duty of a court hearing an appeal from the decision of a judge without a jury is to make up its own mind, not disregarding the judgment appealed from, and giving special weight to that judgment in cases where the credibility of the witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted and to decide accordingly, but where the jury finds the facts, it is the province of the court to determine whether there is any evidence proper for submission to the jury, and if it be determined that there is such evidence, a verdict based upon it is not to be disturbed unless the court should think it such that reasonable men could not have found as the jury did, or, in other words,

before a Court of Appeal is justified in granting a new trial on the ground that the verdict of a jury is against the weight of evidence, the court must be satisfied that the evidence so strongly preponderates in favour of one party as to lead to the conclusion that the jury in finding for the other party, have either wilfully disregarded the evidence or failed to understand and appreciate it."

While the volume from which the above extract is taken was published in 1927, the most recent case, Day vs. Toronto Transportation Commission, [1940] S.C.R. 433, indicates that the above is an accurate statement of the law applicable to-day where an appeal is taken from the finding of a jury. An extract from Lord Dunedin's judgment in Wilson vs. Kinnear, [1925] 2 D.L.R. 641, at page 646 is also helpful in indicating the principles upon which the Court of Appeal must proceed. His Lordship says:

> "Had the verdict been the verdict of a jury their Lordships think that it could not have been set aside. But the judgment of a judge is in a different position. A Court of Appeal has not to consider whether there is any evidence on which the verdict could be reasonably based; it has to consider whether it, on the evidence, would have come to the same conclusion, and that is what the Appeal Court did."

While there are no doubt reasons why the Court of Appeal should be more restricted in interfering with a finding of fact by a jury than with a finding of fact of a judge sitting alone, the restriction under the present law appears to warrant some relaxation. The present rule renders it impossible for the Court of Appeal to interfere where the jury has acted unreasonably unless the finding amounts to something which might be termed grossly unreasonable. While taking the view that the Court of Appeal should be allowed more latitude than the present rule permits, the Committee fully realizes that any widening of the powers of the Court of Appeal must be effected with limitations. Great care must, therefore, be taken in drafting any amendment so that the Court of Appeal may not interfere with the finding of fact by a jury unless the jury is clearly wrong.

Many of the witnesses who appeared before the Committee, including judges of both the trial division and the Court of Appeal, as well as counsel having experience in the Court of Appeal, agreed that it would be well to extend the powers of the Court of Appeal but that any extension of the powers must be definitely and carefully limited. No one was able to suggest a formula which would satisfactorily take care of this situation. Undoubtedly if the provisions of The Judicature Act under which the Court of Appeal derives its power are to be amended so as to extend the powers of the Court of Appeal, the exact wording must be the subject of careful study.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That the power of the Court of Appeal in appeals from judgments based upon the findings of a jury be extended, but that any such extension be definitely limited; and

2. That the matter of exact wording to be employed in effecting such extension of power be referred to the Law Revision Committee, if and when such committee is constituted.

THE EVIDENCE ACT

The law of evidence in Ontario relating to civil matters is, in the opinion of the Committee, a branch of the law which warrants careful study with a view to effecting a thorough revision in the light of present-day conditions and recent English legislation. The English Evidence Act of 1938 is, in some respects, a departure from well established rules of evidence prevailing in the common law countries and merits consideration and study in this jurisdiction. The considerations which prompted the preparation and introduction of that legislation are indicated by the Right Honourable Lord Maugham in an address which he prepared to deliver at the meeting of the Canadian Bar Association at the City of Quebec in August, 1939, at which time he was Lord High Chancellor of England. (See (1939), 17 Canadian Bar Review 469.)

The detailed and lengthy study of the whole field of evidence which would be involved in a revision of The Evidence Act (Ontario) could not be undertaken by this Committee. The Committee is of opinion that such a study might appropriately be committed to the Law Revision Committee, the establishment of which is recommended in another part of this report.

The Committee Therefore Recommends:

That the laws of evidence be carefully studied with a view to revising The Evidence Act in the light of present-day conditions and of recent changes in the law of evidence in England and that such a study be made by the Law Revision Committee referred to in another part of this report if and when such Committee is established.

EXPENSES OF TRIAL WHERE THE VENUE IS CHANGED

While the Rules of Practice require certain types of cases to be tried in a particular county or district, such provisions apply to a small proportion of civil trials, the general practice being that the place of trial is chosen by the plaintiff and a change of venue is ordered only where justified by reason of "preponderance of convenience", having regard to the place of residence of the witnesses and other relevant factors. It is thus impracticable to provide for the reimbursement of one county by another with respect to the expenses of the trial whether the theory of reimbursement is placed on the basis of the place of residence of the parties, the place where the cause of action arose, or otherwise. In many cases at least one of the parties resides in a different county or district from that of the other party or parties, and in other cases the cause of action may have arisen partly in one county or district and partly in another county or district, the result being that it is practically impossible to lay down any rule which would be workable and which would apply satisfactorily to a reasonably large proportion of cases going to trial. The principle contained in section 18 of The Administration of Justice Expenses Act which applies to indictable offences is not adaptable to civil cases by reason of the different principles which apply in fixing the place of trial.

It is doubtful whether any county has suffered any real injustice by the present rules of practice because with the large number of cases which are tried

throughout the Province annually a natural balancing process operates to take care of the situation.

There is, however, an exception to the general rule applicable to the determination of the place of trial in civil actions indicated above, and that is the practice which permits a judge to change the venue from one county to another when he is satisfied that a fair trial cannot be had at the place where the venue was originally laid. In these cases a new venue is chosen either arbitrarily or upon principles which do not otherwise apply, so that the county or district in which the venue has originally been laid is relieved of the expense of the trial for reasons which do not ordinarily play a part in determining the place of trial.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That where a change of venue is ordered in a civil action on the ground that a fair trial cannot be had in the county of original venue, the county of original venue be required to reimburse the county in which the trial is held and that such requirement be made appropriately applicable to provisional judicial districts; and

2. That the Rules of Practice should be correspondingly amended so as to require every order changing the venue to indicate the reason for the change.

JUDICIAL DISTRICTS FOR CRIMINAL ASSIZES

The proposal that the counties be grouped into judicial districts for the holding of criminal assizes has on more than one occasion been advocated and is usually justified by the statement that "we are not living in the horse and buggy days".

In view of the fact that criminal matters and civil matters are both tried at the same assizes, the juries for both types of cases being selected from the same jury panels, it is by no means clear that any advantage would result from the establishment of judicial districts for criminal assizes if no change were made with regard to the holding of sittings of the Supreme Court for the trial of civil cases. In any event the adoption of the system of judicial districts would compel parties, witnesses and counsel to travel greater distances. Some of the jurors would also have to travel longer distances if the jury panels were to contain residents of the county in which the proceedings originated. It is doubtful whether any saving of expense either to the parties involved or to the general public would result but, in any event, any saving so effected would probably be out of proportion to the inconvenience resulting. The Committee accordingly disapproves of the establishment of judicial districts for criminal assizes.

THE COMMITTEE THEREFORE RECOMMENDS:

That no action be taken with regard to the establishment of judicial districts for criminal assizes.

JURIES

Grand Juries

The advisability of abolishing or retaining grand juries has been a matter of controversy in Ontario for a great many years. The question has been discussed in many organizations and in the Legislature itself, a Bill for abolition having been introduced in the year 1933. There is undoubtedly a considerable difference of opinion both among members of the legal profession and others. The members of the Committee themselves hold different views as is indicated below where the further views of the Chairman are set out.

Few institutions in the British Empire are as old as the grand jury system. An excellent and brief outline of the development of the grand jury appears in the report of Mr. F. H. Barlow, K.C., Master of the Supreme Court of Ontario, to the Attorney-General, dated the 7th of July, 1939, and published in a special issue of the Ontario Weekly Notes dated March 8th, 1940. The Committee, therefore, does not deal with the historical background of grand juries being of opinion that Mr. Barlow's report covers the ground quite sufficiently and is readily available to interested parties.

The Committee probably heard more evidence and received more submissions on this than on any other subject and is of the opinion that before stating its recommendations the convenience of the Legislature and the public interest may best be served by setting out in brief outline the various reasons which were advanced for and against abolition. However, it may be stated at this stage that few witnesses who appeared before the Committee advocated outright abolition; in fact the overwhelming opinion expressed in written and verbal representations to the Committee was against outright abolition.

For Abolition—

Grand Juries in Other Jurisdictions. Grand juries have been abolished entirely or in part in many jurisdictions in the British Empire as appears from the following:

England—Abolished from 1917 to 1922; abolished again in 1933 with some minor exceptions.

Scotland—Grand juries never existed.

Ireland—Grand juries do not exist.

South Africa—Abolished in 1885.

Australia—From best sources available it appears that grand juries have not been used in Australia for nearly one hundred years.

Canada—

Alberta—Grand juries never existed.

Saskatchewan—Grand juries never existed.

Manitoba—Abolished in 1923.

British Columbia—Abolished in 1932.

Quebec—Abolished in 1933.

The abolition of grand juries in England was preceded in 1913 by an investigation and report by commissioners under the chairmanship of Viscount St. Aldwyn, and again in 1933 by the Business of Courts Committee under the chairmanship of Right Honourable the Master of the Rolls, Lord Hanworth of Hanworth. The findings of these bodies which resulted in the abolition of grand juries in England in 1917 and in 1933, are of interest and importance in considering the matter as it affects the Province of Ontario. The Committee, however, does not think it is necessary to quote from these reports since they are available to those having occasion to refer to them. Furthermore, the Committee, with the exception of the chairman, has felt that the reasons which brought about the abolition of grand juries in England would not be entirely relevant to the situation in this province, the problem being whether grand juries should be continued here under prevailing conditions.

For Abolition—

Saving of Expense. In his report above referred to, Mr. Barlow states, "It has been estimated that the cost of grand juries in the Province of Ontario exceeds $50,000 annually." This, however, was only the roughest kind of estimate. The Committee is of the opinion that it is practically impossible to arrive at any accurate figure as to the cost of grand juries, or conversely as to the amount which would be saved by their abolition. The impossibility of arriving at any accurate figure is due to the fact that the existence of grand juries creates many duties and situations involving expense, e.g., the work of the local boards of selectors, the work of the county or district selectors, the serving of summonses, the time of the court and court officials engaged while grand juries function, the time of petit juries delayed while grand juries function, the time of counsel and witnesses consumed while grand juries function, the witness fees and mileage paid to witnesses appearing before grand juries, the time of Crown counsel before grand juries and, of course, the fees and mileage paid to grand jurors themselves.

On the other hand, a grand jury, when it finds a "no bill", saves the community and the accused the expense of a trial and this phase of the matter must be considered in arriving at any estimate as to the net cost of grand juries. Mr. J. W. McFadden, K.C., Crown Attorney for the County of York, stated that there was always plenty of work which could be proceeded with in the Toronto courts while the grand jury was functioning. Furthermore, Mr. McFadden stated that in his opinion grand juries had saved money in Toronto since many "no bills" had been found. The saving suggested by Mr. McFadden in the case of Toronto, and which perhaps would apply in the other larger urban centres, is mentioned by the Committee to indicate the difficulty in arriving at any definite figure as to the saving which might be expected over the entire province. The overall expense throughout the province may be exceedingly small.

In the City of Toronto, according to figures submitted by Mr. McFadden, for the period from October, 1935, to January, 1940, 142 criminal cases were investigated by grand juries in Assize Courts. There were "no bills" in 34 cases, or in about 24 per cent of those submitted. In January, 1941, of 20 cases examined by Assize Court grand juries "no bills" were found in 6. In cases where "no bills" are found the public and the accused are saved the costs of trial which include attendance of counsel, witnesses and petit jurymen and all the other items going to make up the costs of trial. One grand jury may examine many

cases and save costs of trial in those in which they find "no bills". The figures for the year 1940 with reference to the work of grand juries throughout the province, as ascertained from a questionnaire sent out to all Crown Attorneys, are as follows:

	Courts of General Sessions of the Peace 1940			Supreme Court of Ontario 1940		
	Total Bills Presented	True Bills	No Bills	Total Bills Presented	True Bills	No Bills
Toronto, Hamilton, Windsor, Ottawa and London.....	78	70	8	70	65	5
Other County and District Towns...	59	48	11	62	53	9
Totals.....	137	118	19	132	118	14

For Abolition—

Magistrates' Preliminary Investigation. In all cases submitted to a grand jury, with the exception of indictments preferred by the Attorney-General or by a person with the consent of the court, there must be a preliminary investigation before a magistrate who, from the evidence adduced, determines whether there is sufficient evidence to put the accused on his trial. If the magistrate finds there is insufficient evidence to warrant putting the accused on his trial, he must dismiss the case on the preliminary investigation.

At one time a considerable percentage of the magistrates conducting such preliminary investigations were laymen. This practice, however, has been changed so that now only barristers are appointed to the Magistrates' Bench. With this change, ensuring the consideration of the evidence in preliminary investigations by men trained in the law, there may be a greater safeguard than was previously the case when lay magistrates considered and adjudicated on the evidence. The figures submitted under the sub-heading Saving of Expenses indicate that there is still much to be desired. The matter is further discussed in succeeding paragraphs.

For Abolition—

Fallibility of Grand Juries. In some jurisdictions in the province it is seldom that grand juries return "no bills". In other jurisdictions a considerable number of cases committed for trial by magistrates are returned by the grand juries as "no bills". This may suggest that in jurisdictions where a large number of bills are returned "no bills", there is only a perfunctory consideration of the evidence by the magistrates on the preliminary investigation. It may be that the certainty of a grand jury intervening before trial leads to carelessness on the part of the magistrates. If, however, the courts in such jurisdictions are so

crowded with work that the magistrates are unable to give proper consideration to such matters, then some change should be made in these particular jurisdictions.

The Committee has been informed of cases in which grand juries have found "no bill" and upon an indictment being subsequently preferred by the Attorney-General a second grand jury has returned a "true bill" and a trial jury has found the accused person guilty. Such cases do not indicate that grand juries are by any means infallible in finding "no bills". It is, of course, impossible to say whether in the cases where a magistrate has committed for trial and the grand jury has subsequently found a "no bill" the magistrate or the grand jury was mistaken. These situations, however, do clearly indicate that in the administration of criminal justice the greatest care must be exercised. Cases submitted to the Committee where "no bills" were found by grand juries after committals had been made by magistrates may indicate that preliminary hearings before magistrates do not altogether supersede grand juries as safeguards. It is impossible for the Committee to form any definite opinion as to who are more generally correct in their conclusions—magistrates in committing, or grand juries in finding "no bills".

In the result the Committee, with the exception of the Chairman, can not conclude that the safeguard afforded by an enquiry by the grand jury should be abolished in all cases. Particularly in cases of murder where the death sentence is mandatory and, when carried out, is irrevocable, the Committee hesitates to recommend the abolition of anything which affords a protection to the accused; in such cases every safeguard should be observed even to the extent of duplication.

For Abolition—

Secret Sittings of Grand Juries. Some criticism has been voiced against the grand jury system on the ground that the hearings are in camera. It has been suggested that grand juries sitting in secret may only reflect the opinion of Crown counsel who usually produce the evidence to the grand jury. There is thus, such critics aver, no real safeguard for the interests of the public, and it is desirable that the administration of justice should be open to all in all its important phases. Because of the absence of any cross-examination there may be some basis for the first objection. As to the second criticism, however, it is difficult to believe that Crown counsel and thirteen representative citizens would knowingly and dishonestly lend themselves to the side-tracking of an issue when they knew there should be a further trial by a petit jury.

Against Abolition—

An Ancient Institution. The historical aspects of the grand jury system have been referred to at the beginning of this section of the report. While there is always sentiment for retaining old customs and old institutions, your Committee, nevertheless, feels that this should not be permitted to stand in the way of bringing our administration of justice up to date to meet present-day conditions. If there are better ways and methods of administering justice, your Committee feels that such ways and methods should be adopted. Because an institution is ancient it is not necessarily fundamental.

Against Abolition—

Administration of Justice Requires Public Co-operation and Confidence. Grand juries provide an important field for public service. Grand

jury service imposes a responsibility for the administration of justice on the individual citizen and creates an opportunity for him to obtain a clear understanding of the care with which the rights of the state and the individual are protected. This knowledge creates a respect for the law and a responsibility for its maintenance. A great many people undoubtedly feel, and many give expression to the view, that the grand jury system should be retained because of its educational value. The holders of this view assert that the people should feel that the administration of justice is something which they control, that it does not consist of mysteries known only to lawyers and judges. The grand jury takes in a cross-section of the whole community in which it presides. It has a view of the moral conditions in that community. It has the opportunity to see how the law is administered and frequently it finds defects in the law and makes recommendations. It is a representative section of the community concentrated upon the moral conditions of that community with a view to improving them if it can. The grand jury imparts to its members a sense of respect for the law and its fairness which is carried back into the community from which it comes. It is an education to those who sit on the jury and it is a method whereby the public can be kept familiar with our laws and criminal administration and, consequently, it inspires public confidence in the administration of justice.

This is particularly important during war time when the public, in the interest of the welfare of the state as a whole, must submit to various forms of regulations; the public should feel that it is taking an important part in the administration of justice by reviewing the evidence before a subject's life or liberty is placed in jeopardy. The Committee, with the exception of the Chairman, is of the opinion that this argument in favour of the retention of the grand jury system is impressive.

This phase of the question also applies to the inspection of public buildings. Although there was much justifiable criticism levelled at the grand jury system because of the unnecessary duplication and repetition of inspections by grand juries, the Committee is of the opinion that occasional inspections of public buildings by grand juries have an undoubted value and that such inspections have a beneficial effect on the officials in charge of such buildings which could not be attained by inspections by departmental officials.

Against Abolition—

Takes Away a Fundamental Right. The grand jury is essentially a safeguard so that an accused person cannot be put on trial before a petit jury unless there is sufficient evidence to warrant putting him on his trial. The functions and adequacy of magistrates and of grand juries as safeguards have been discussed in a previous paragraph.

Against Abolition—

Safeguard Against Indictments by the Attorney-General or Any Person by Order of Court under Section 873, Criminal Code. Under the Criminal Code the Attorney General may prefer a bill of indictment for any offence and any person may prefer a bill of indictment by order of the court. In both cases the indictment must go before a grand jury and a true bill must be found before the person indicted is placed on his trial. It has been pointed out to the Committee that if grand juries were abolished, a person could be indicted

by the Attorney-General or by any person on the order of the court and placed on his trial without the intervention of a magistrate or grand jury or any other safeguard against capricious or unwarranted prosecution. It is conceivable that an accused person might be put on trial for his life without any impartial judicial body or officer having determined whether there was sufficient evidence to put him on his trial. The Committee agrees that this is a fundamental difficulty and one that must be met if grand juries are to be abolished. While, fortunately, the Province of Ontario has always had Attorneys-General who would be unlikely to abuse the power vested in them, the Committee feels that a long view must be taken and that a safeguard must be interposed which would prevent any possible abuse of the power.

The Committee has decided and recommends that where an indictment is laid by an Attorney-General or by anybody on the order of the court a reviewing jury should function in the same manner as a grand jury as more particularly hereinafter set out.

Conclusion

After carefully considering the representations and submissions made to the Committee and the arguments for and against abolition which have been briefly referred to, the Committee has come to the conclusion and recommends that there should be a partial abolition of grand juries in the province, subject to the views of the Chairman hereinafter expressed.

The Committee, with the exception of the Chairman, is of the opinion that there is a considerable difference between cases tried in the courts of general sessions of the peace of the counties and districts and those tried in the Supreme Court. In cases triable in the courts of general sessions of the peace the accused person has three options. He may be tried in a summary manner before a magistrate, he may elect speedy trial before the county judge without a jury, or he may elect trial by a jury. In other words, at the present time as to such offences the accused may elect a mode of trial which does not involve an enquiry by a grand jury. Hence, the abolition of grand juries in such cases does not involve as complete an interference with the rights of accused persons as would the abolition of grand juries in Supreme Court. In every case, however, there has been a preliminary examination by a magistrate and the accused has full knowledge of the charge and the nature of the evidence which will be adduced against him and the points which he will have to meet at his trial.

On the other hand, in cases triable in the Supreme Court the accused generally has no option to be tried in the several ways above indicated. Cases triable in the Supreme Court include such offences as murder, treason and rape in which the penalty is or may be death, and manslaughter where the penalty may be life imprisonment, and other serious offences.

The Committee, therefore would recommend the abolition of grand juries in the courts of general sessions of the peace but would retain grand juries in the Supreme Court, subject, however, to the views of the Chairman who, while agreeing with this conclusion of the majority of the Committee as to the abolition of grand juries in the courts of general sessions of the peace, would go farther and would abolish grand juries in all courts as hereinafter set out.

The Committee is of the opinion, however, that as previously indicated, safeguards should be set up where an indictment is preferred by the Attorney-General or by any person on the order of the court and recommends that this situation be met in the courts of general sessions of the peace by swearing in a reviewing jury of nine men from the petit jury panel which would function in the same manner as grand juries to find a "true bill" or "no bill" on such indictments. This practice is not without precedent because at the present time a jury may be sworn in from the petit jury panel to try the preliminary issue whether an accused person is fit to stand his trial.

In similar manner, if, under the laws amended pursuant to the recommendation of this Committee, an inspection of public buildings is deemed necessary by the presiding judge during the sittings of any court of general sessions of the peace, an inspecting jury could be sworn in from the petit jury panel for the purpose.

The question of the number necessary to constitute a grand jury has also engaged the attention of the Committee and representations have been made to the Committee on this point. The Committee does not feel that there is any particular merit in or necessity for the present number of thirteen to constitute a grand jury and is of the opinion that a grand jury of nine would provide ample safeguards for the purposes for which the grand jury is constituted and would effect some economy.

Further views of the Chairman

The Committee was constituted to enquire into the administration of justice with a view to,—" . . . . simplifying, facilitating, expediting and otherwise improving practice and procedure in the . . . . courts and effecting economy to the people, the municipalities and to the province generally." In my opinion, there is no aspect of the administration of justice in which these purposes could be more effectively accomplished than by the abolition of grand juries. The retention of grand juries is the very antithesis of the purposes of the Committee because there is nothing which more effectively complicates the practice and retards proceedings in the courts, involving expense which might very well be avoided.

While I am in agreement with the views of the majority of the Committee as far as they go, and I am entirely in favour of the abolition of grand juries in the courts of general sessions of the peace, I would unhesitatingly, and particularly in these war times, go further and abolish grand juries in all the courts.

There appear to be two main objections to total abolition — that grand juries are necessary as a safeguard for accused persons and that grand juries serve to familiarize the members of the jury with the administration of justice.

While every reasonable safeguard is necessary to prevent innocent persons being subjected to the jeopardy, inconvenience, expense and embarrassment of a trial, I do not feel that under our present system grand juries are at all necessary for this purpose. The report of The Business of Courts Committee in England under Lord Hanworth, March, 1933 (at page 70), states, "We . . . have not failed to appreciate that an accused person might rightly value the

rejection of a bill of indictment against him without having to stand a trial. Yet we have to balance these advantages against the cost both in time and money and the burden of service involved by their retention." That, I think, is the real question to be determined, i.e., whether the advantages are commensurate with "the cost both in time and money and the burden of service involved by their (grand juries) retention."

As to safeguards, the situation in Ontario is vastly changed from what it was some years ago. At the present time only barristers are appointed magistrates whereas prior to 1934 many laymen were appointed and the majority of magistrates were laymen. In 1933, of the 148 magistrates in Ontario 115 were laymen and only 33 were barristers. At present, of 72 magistrates in the province 48 are barristers and only 24 are laymen. This ratio of barristers to laymen will undoubtedly increase with the maintenance of the present policy of appointing only barristers as magistrates. We now, therefore, have the situation that in most of our magistrates' courts the evidence is heard and the law is applied by magistrates trained in the law and their decisions whether to commit for trial or otherwise, are a much greater safeguard than was previously the case when such a large proportion of laymen performed the same function. Furthermore, I am confident after several years' experience as Crown attorney and more recently as Attorney-General, that the abolition of grand juries will engender more careful consideration by magistrates before committing than is now the case. It is only natural that when magistrates know there is no further intervening tribunal before accused persons must stand trial they will be very circumspect about committing for trial. On the contrary, and from the same experience, I am of the opinion that under the present system there is sometimes, and not unnaturally, a disposition on the part of magistrates to commit for trial, realizing that a grand jury will intervene to determine whether there will be a trial or not. As a matter of fact, it not infrequently happens now that cases are committed for trial by consent of counsel for the accused. All of this would be eliminated, and I am confident that there would be far greater care on the part of magistrates before committing for trial if grand juries were abolished.

The views of British jurists are also worthy of consideration. On this aspect of safeguards Lord Marshall of Chipstead had this to say (House of Lords Debates 1933, Page 1058),—"It has been argued that the safety of the subject is protected by the grand jury. . . . Inasmuch as representatives of the British press attend all our courts of summary jurisdiction they are the best protection for the British public." The Lord Chancellor, Viscount Sankey, in the same debate expressed himself similarly in these words,—"I quite agree with my noble friend Lord Marshall, that one of the greatest safeguards to prevent injustice being done nowadays is a vigilant press. . . . Experienced . . . magistrates . . . and a vigilant press have rendered the necessity for a grand jury quite out of date." I am in entire agreement with these statements and regard them as constituting very substantial if not, indeed, conclusive answers to those who argue that grand juries are still necessary as safeguards.

The figures as to the number of "no bills" found by grand juries in Ontario are offered by some as proof or, at any rate, as an argument for the retention of grand juries. If it could be assumed that grand juries are infallible I would agree that these figures are impressive. But again from my experience as Crown attorney and as Attorney-General, I am by no means convinced that grand

juries are infallible. As a matter of fact, I recall several cases, and no doubt many others have occurred, where grand juries found "no bills," indictments were afterwards preferred, subsequent grand juries found "true bills," and the accused were convicted at their trial. While, undoubtedly, safeguards for accused persons are necessary, the interests of the state are also of consequence. It is not, therefore, unreasonable or illogical to observe that of the number of "no bills" found by grand juries, some proportion may have been incorrectly so found and the state may have suffered thereby. In other words, it is by no means certain that grand juries are always right in their conclusions when they find "no bills" so that they may be safeguards to accused persons at the expense of that which is in the best interests of the State.

As to the argument that the grand jury system serves to familiarize grand juries with our system of the administration of justice, I refer to the remarks of Lord Darling (House of Lords Debates 1933, Page 1056) where he said,—"It is, I think, hardly worth while putting so many people to trouble and expense, as the Lord Chancellor has indicated, simply in order that some of the grand jurors may receive what is similar to a University education." In the remarks of Lord Marshall of Chipstead and of the Lord Chancellor, Viscount Sankey, which I have previously quoted, reference is made to the press and to a "vigilant" press in relation to the administration of justice. I think that the splendid service rendered by the press nowadays, with their extensive reports of proceedings in our courts supplies whatever might be lost by the abolition of grand juries in the direction of familiarizing grand jurors with the administration of justice. Means of communication and for the dissemination of information have improved so enormously in the last few years that almost every detail—in fact sometimes too many details—of all important court proceedings are reported in the press. The radio also adds to the distribution of information along similar lines. I am, therefore, unable to see that this advantage, if it can be considered an advantage, is at all commensurate with or even an important factor against, "the cost both in time and money and the burden of service involved by their (grand juries) retention," to repeat the words used in the report of the Business of Courts Committee previously quoted.

I am unable to understand why it is necessary for us to retain grand juries in this province when they have been abolished in most other jurisdictions of the British Empire. Ontario is, in fact, the only remaining jurisdiction of considerable size and population which retains the grand jury system. I cannot believe that conditions here are so radically different from what they are in other British jurisdictions as to make it necessary for us to retain grand juries when they have been abolished in so many other jurisdictions. I am quite sure that the remaining safeguards in Ontario would be just as ample as they are in the other jurisdictions. I am equally certain that the desirability of familiarizing grand juries with the administration of justice is no greater here than in the other jurisdictions.

While, as stated in the report of the majority of the Committee, the opinions expressed and representations made to the Committee did not favour the abolition of grand juries, I am not particularly impressed with or influenced by this fact. It is, I think, regrettable that so many persons in Ontario who participate in or are associated with the administration of justice, either fail to appreciate the desirability of improving conditions or are so concerned with tradition that they are unable to reconcile tradition with the desirability of "simplifying, facilitating,

expediting and otherwise improving practice and procedure in the Courts and effecting economy to the people, the municipalities and to the province generally". In this repect we have lagged far behind most jurisdictions in the British Empire, and notably England herself. Enormous strides have been made in this direction in England within the last quarter century and I am unable to understand why we of this province cannot make equal progress, particularly since our jurisprudence, our practice and our entire system of the administration of justice is based on that of England.

Grand juries were abolished in England, probably as a war measure, during the period 1917 to 1922. It is most significant that with that experience, and after an interval of over ten years, by an Act of the British Parliament grand juries were again abolished in 1933 with some minor exceptions as to counties and offences and they remain abolished at the present time. I would, therefore, and as a war measure in the present very serious emergency, abolish all grand juries in this province for the duration of the war and for one year thereafter. I do not feel they are necessary for the reasons I have endeavoured to state. But I do feel that before the conclusion of the present struggle we will need the services of every able bodied man and woman to assist in our war effort, directly or indirectly. I think that it is an anomaly to continue, for the duration of the war at any rate, our grand jury system involving the attendance at court of a judge, grand jurors, witnesses, officials and all the array of persons which grand juries involve.

THE COMMITTEE THEREFORE RECOMMENDS, subject to the further views of the Chairman as expressed above,—

1. That grand juries be abolished in the courts of general sessions of the peace;

2. That the present system of grand juries be continued in the Supreme Court of Ontario;

3. That provision be made for the swearing in of reviewing juries from the petit jury panel when an indictment is preferred by the Attorney-General or by any person by the order of the court, before any court of general sessions of the peace;

4. That the number of grand jurors be reduced to nine and the number required to find a true bill be reduced to five; and

5. That the presiding judge, at any sittings of the court of general sessions of the peace, shall be empowered to swear in a jury of nine from the petit jury panel for the purpose of making an inspection of public buildings, if in the opinion of such judge an inspection is desirable and may be properly made under the laws as amended in accordance with the Committee's recommendations under the heading INSPECTING JURIES.

INSPECTING JURIES

For a great many years it has been the practice of the courts to permit the grand jury to make an inspection of the public buildings of the county. No statutory authority for such inspections existed in Ontario prior to 1936. Because

of the frequency of visits of grand juries to certain public institutions, particularly in the city of Toronto where seven grand juries are called each year, legislation was passed in 1936 for the purpose of limiting the number of inspections made by grand juries. The words which operate to effect such restriction and which are contained in subsection 1 of section 44 of The Jurors Act are ". . . where such an inspection has been conducted within the county or district within six months prior to the date of the commencement of such sittings, no inspection shall be made without the specific consent of the judge." The evidence before the Committee is that the legislation has not been as effective in restricting the number of inspection trips as it might be, by reason of the fact that some of the judges, acting under the final words of the provision, specifically consent to inspections being made by grand juries notwithstanding that inspection has been made by another grand jury within the preceding six months. In fact the city hall and the gaol at Toronto have been inspected by grand juries on thirteen occasions since October, 1936. The Committee is of opinion that a provision limiting the number of inspections by grand juries should not be subject to any exception by reason of a judge directing or consenting to the making of additional inspections.

THE COMMITTEE THEREFORE RECOMMENDS:

That section 44 of The Jurors Act be amended by striking out the words "without the specific consent of the judge" at the end thereof.

IMPROVING QUALIFICATIONS OF JURORS

Many submissions have been made to the Committee that it is desirable to improve juries by raising the qualifications of the persons whose names appear on the jury panels. It is the opinion of the Committee that if the present law were carefully carried out by the county selectors, local selectors and others who are charged with duties under it, there would be less cause for complaint as to the persons comprising jury panels.

With regard to the suggestion that assessors in compiling their lists should be required to indicate the educational attainments of persons eligible for jury duty, it was generally agreed by those expressing views to the Committee that, while in some cases educational attainments may be of assistance in determining whether or not a man will make a good juror, many persons eminently qualified to serve on juries have had little schooling. The suggestion that assessors indicate generally the education, experience and physical fitness of persons eligible for jury duty was also considered to be an unsatisfactory answer to the problem. In the larger cities assessors frequently do not see many of the persons who are eligible for jury service and the Committee has concluded that any information which the assessors might be required to furnish, in addition to that now given by them, would be of no material assistance.

The proposal that a board be set up in each of the larger urban centres, by increasing the size of the board of local selectors or otherwise, which would investigate all persons whose names are proposed to be placed upon the jury list must be dismissed as impracticable in view of the great amount of work involved in making a personal investigation of many hundreds and, in some cases, thousands of persons.

The Committee is impressed by the choice and clarity of the language by which the manner of selecting jurors is prescribed in The Jurors Act. Subsection 2 of section 16 requires the local selectors to "select such persons as in their opinion, or in the opinion of a majority of them, are, from the integrity of their characters, the soundness of their judgment and the extent of their information, the most discreet and competent for the performance of the duties of jurors." Subsection 1 of section 21 requires that the local selectors shall "distribute the names of the persons so selected into four divisions; the first consisting of persons to serve as grand jurors in the Supreme Court; the second of persons to serve as grand jurors in the inferior courts; the third of persons to serve as petit jurors in the Supreme Court; and the fourth of persons to serve as petit jurors in the inferior courts, and shall make such distribution according to the best of their judgment with a view to the relative competency of the persons to discharge the duties required of them respectively." The directions contained in these provisions if properly followed, would result in suitable persons being chosen for jury duty. In order to ensure that these directions are properly complied with, the Committee favours a provision that every selector be required to take an oath that he has conscientiously carried out the provisions of The Jurors Act relating to the selection of jurors before being entitled to receive any allowance in respect of his services.

Criticism has been directed at the number and nature of the classes of persons who are exempted from jury duty by section 3 of The Jurors Act. A study of the exemptions indicates that the classes of persons exempted are so numerous and some classes so large, that the general qualification of jurors on the lists is probably impaired. For convenience the exemptions are here set out:

> 3.—(1) The following persons shall be exempt from being returned and from serving as grand or petit jurors, and their names shall not be entered on the rolls prepared and reported by the selectors of jurors as hereafter mentioned:—
>
> (*a*) Every person sixty-five years of age or upwards;
>
> (*b*) Every member of the Privy Council of Canada and of the Executive Council of Ontario;
>
> (*c*) Every member of the Senate and of the House of Commons of Canada and of the Assembly;
>
> (*d*) The secretaries of the Governor-General and of the Lieutenant-Governor;
>
> (*e*) Every officer and other person in the service of the Governor-General or of the Lieutenant-Governor;
>
> (*f*) Every officer, clerk and servant of the Senate and of the House of Commons of Canada, of the Assembly, and of the Public Departments of Canada and of Ontario;
>
> (*g*) Every officer and servant of the Dominion and Provincial Governments;

(*h*) Every judge;

(*i*) Every police magistrate;

(*j*) Every sheriff, coroner, gaoler and keeper of a house of correction or lock-up house;

(*k*) Every sheriff's officer and constable;

(*l*) Every minister, priest or ecclesiastic under any form or profession of religious faith or worship;

(*m*) Every barrister and every solicitor of the Supreme Court actually practising, and every student-at-law;

(*n*) Every officer of any court of justice;

(*o*) Every physician, surgeon, dental surgeon, pharmaceutical chemist and veterinary surgeon qualified to practice, and in actual practice;

(*p*) Every member of His Majesty's Army, Navy or Air Force on full pay;

(*q*) The officers, non-commissioned officers and men of every militia corps, and a certificate under the hand of the officer commanding any such corps shall be sufficient evidence of the service in his corps of any officer, non-commissioned officer or man for the then current year, and of his exemption;

(r) Every pilot and seaman engaged in the pursuit of his calling;

(*s*) Every head of a municipal council;

(*t*) Every municipal treasurer, clerk, collector, assessment commissioner, assessor and officer;

(*u*) Every professor, master, teacher, officer and servant of any university, college, institute of learning or school;

(*v*) Every editor, reporter and printer of any public newspaper or journal;

(*w*) Every person employed in the management, working of a railway or street railway and every person permanently employed by any public commission carrying on the business of developing, transmitting or distributing electrical power or energy;

(*x*) Every telegraph and telephone operator;

(*y*) Every miller;

(*z*) Every fireman belonging to any fire department or company, who

has procured the certificate authorized by section 1 of The Firemen's Exemption Act, during the period of his enrolment and continuance in actual duty as such fireman; and every fireman who is entitled to and who has received the certificate authorized by section 4 of the said Act; but no fireman shall be exempt from serving as a juror unless the captain or other officer of the fire department or company, at least five days before the time appointed for the selection of jurors, notifies to the clerk of the municipality the names of the firemen belonging to his department or company, and residing within the municipality, who are exempt and claims exemption for them.

The Committee favours the repeal of clauses (*e*), (*f*) and (*g*) being of the opinion that there is no special reason for exempting civil servants from jury duty. The Committee would insert the words "police officer" and "police constable" in clause (*j*), because the nature of the duties performed by police officers and police constables renders it essential that they always be available for the performance of their duties. The Committee would restrict clause (*o*) so that it would apply only to physicians and surgeons in actual practice. The Committee favours the repeal of clause (*q*) as members of the Army, Navy and Air Force on full pay are exempted by the previous clause. The Committee also favours the repeal of clauses (*t*), (*u*), (*v*) and (*y*) on the ground that no real need for exempting the persons therein listed exists to-day. The Committee suggests that clause (*w*) should be repealed and the following substituted therefor:

(*w*) every person employed in the actual working of a railway or street railway or public commission carrying on the business of developing, transmitting or distributing electrical power or energy.

The purpose of this provision is to exempt persons carrying on essential services, and the Committee is of opinion that the revised wording would except from exemption those persons whose attendance at work is not absolutely essential.

The Committee's purpose in recommending a revision in the present exemptions is to achieve as far as possible an improvement in the qualifications of jurors. It is not to be presumed that the persons who are removed from the provisions of the exemption clauses have no special reasons to claim exemption. Rather it is an indication that any such reasons are outweighed by the need for jurors with the best possible qualifications.

Jury service should be regarded not only as the right, but the responsibility and duty of every citizen. Exemption from military service is not permitted upon the ground of inconvenience to the individual. Jury service is essential to our system of administering justice, and in the interests of the jury system and the administration of justice it is of paramount importance that individuals summoned as jurors should assume their obligation to society.

The Committee would not exclude in an arbitrary way any exemptions other than those provided by section 3 of The Jurors Act, but would recommend the adoption of means to prevent any person not coming within the exemption clauses from being excused from jury duty except after careful investigation of all the facts by a judge.

It has been represented to the Committee that it is not uncommon for persons to be excused from jury duty after being summoned by reason of their having important business engagements which conflict with their attendance in court and it is suggested that such a practice is becoming altogether too prevalent in certain parts of the Province. In order to dispel any suggestion that persons may be improperly excused from jury duty, the Committee would require all such applications to be made to a judge, and as Supreme Court judges attending the Assizes are in the county town for a very short time and have neither time nor opportunity to deal adequately with such matters, the Committee would give county and district court judges jurisdiction in such matters. In order that the sheriff may have ample notice of any alterations in the jury list by way of exemptions, all applications for exemption should be made not less than five days before the date fixed for the attendance of a jury and applications should be made to the judge through the sheriff who would be responsible for the attendance before the judge of any person desiring to be exempted.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That every person charged with the duty of selecting persons for jury service be required to take an oath that he has conscientiously carried out the provisions of The Jurors Act with regard to the selection of jurors devolving upon him as a county or local selector, or as the case may be, before being entitled to receive the fees provided by the Act;

2. That the following persons now exempt be made liable for jury duty by making the necessary amendments to The Jurors Act:

(*a*) Every officer and other person in the service of the Governor-General or of the Lieutenant-Governor;

(*b*) Every officer, clerk and servant of the Senate and of the House of Commons of Canada, of the Assembly, and of the Public Departments of Canada and of Ontario;

(*c*) Every officer and servant of the Dominion and Provincial Governments;

(*d*) Every dental surgeon, pharmaceutical chemist and veterinary surgeon;

(*e*) The officers, non-commissioned officers and men of every militia corps;

(*f*) Every municipal treasurer, clerk, collector, assessment commissioner, assessor and officer;

(*g*) Every professor, master, teacher, officer and servant of any university, college, institute of learning or school;

(*h*) Every editor, reporter and printer of any public newspaper or journal; and

(*i*) Every miller;

3. That the exemptions applicable to persons employed in the management and working of railways, street railways and power commissions be restricted to persons employed in the actual working of such railways and commissions;

4. That police officers and police constables be exempted from jury duty; and

5. That any person summoned for jury duty be excused only by a judge upon showing reasons therefor beyond his control or reasons other than mere inconvenience; and that all applications be made to the county or district court judge through the sheriff at least five days before the day named for attendance.

Increased Fee in Jury Actions

With respect to the view which has been expressed that the jury fee now payable upon entering a civil action for trial should be increased to a more substantial amount, as is the case in the Provinces of Quebec and Manitoba, the Committee observes that while it is desirable to reduce the expenses of litigation which are paid out of taxation, it is equally important to ensure that no obstacle is placed in the way of any person who desires to have his rights determined by a jury.

The Committee Therefore Recommends:

That the fee payable upon entering an action for trial by jury be not more than a nominal amount.

Jury Trials Involving Corporations

In most of the provinces of Canada it has been recognized, either by legislation or by judicial decisions, that actions against municipal corporations are to be distinguished from actions against persons or other corporations in so far as the right to a trial by jury is concerned. The practice of requiring actions against municipal corporations, where the issue is based on the non-repair of a highway or sidewalk, to be tried without a jury is fairly general. None of the provinces, however, appears to have any special legislation relating to trials involving other types of corporations. The Committee is therefore not inclined to make any recommendation respecting the practice at trials where a corporation other than a municipal corporation is involved.

Section 53 of The Judicature Act reads:

53. Actions against a municipal corporation or board of police trustees for damages in respect of injuries sustained by reason of the default of the corporation in keeping in repair a highway or bridge, shall be tried by a judge without the intervention of a jury, and the trial shall take place in the county which constitutes the municipality or in which the municipality or police village is situate.

It may be observed that there are two principal limitations contained in

the section. First, it is limited to actions against municipal corporations or boards of police trustees and, secondly, it is further limited to actions for damages in respect of injuries sustained by reason of the default of the corporation in keeping in repair a highway or bridge.

There seems to be little doubt that the reason for the second limitation is that when the section was enacted a substantial majority of the actions brought against municipalities at that time were in respect of the non-repair of highways and bridges. To-day other actions based on negligence are frequently brought against municipal corporations by reason of the extended nature of municipal undertakings. As a convenience and service to the public, municipal corporations are called upon to and do operate utilities of various kinds including electrical supply systems, transportation systems and waterworks systems.

The narrowness of the first of the limitations in the above quoted section is probably explained by the fact that the section was passed before it became the general practice of municipal corporations to create public utility commissions and charge them with certain duties and functions otherwise carried out by the municipal council. Where, however, a separate board or other body is created for the purpose of exercising and performing powers and duties which would otherwise be exercised and performed by the council it appears that the same rights and privileges relating to trials of actions should be extended to that board or other body. The reasonableness of this is appreciated when it is pointed out that the section would apply to an action for the non-repair of a highway within a cemetery owned and operated by the municipality, whereas in a municipality where the council has delegated its power with respect to the cemetery to a cemetery board, the section would not apply.

On the other hand a board or commission which has been created by a municipal council to carry on certain of the undertakings of the municipality, may, with regard to some of its undertakings, be in actual competition with other persons or corporations. In such cases it may be argued that the creation of a board or commission by a municipal council does not justify the application of any special law to the board unless that law also applies to the competitor. In view of the possibility of such competition, the Committee is not inclined to recommend that actions against boards and commissions created by municipal councils be tried without a jury in all cases but feels strongly that such a principle warrants further consideration.

It may be pointed out that the exclusion of jury trials in actions against certain corporations is not without precedent. By section 28 of The Sandwich, Windsor and Amherstburg Railway Act, 1930, it is provided that "every action brought for damages by reason of negligence in the operation of the railway . . . shall be brought and tried as if it were an action against a municipal corporation for damages in respect to injuries sustained by reason of the default of a corporation in keeping in repair a highway."

THE COMMITTEE THEREFORE RECOMMENDS:

1. That section 53 of The Judicature Act requiring certain types of actions against municipal corporations and boards of police trustees to be tried without a jury be extended to apply to all actions for damages in

respect of injuries sustained by reason of the default or negligence of municipal corporations and boards of police trustees; and

2. That consideration be given to the extension of the principle of requiring trial of actions without a jury to all actions against bodies corporate created or established by municipal corporations pursuant to statutory authority in respect of injuries sustained by reason of the default or negligence of any such body.

Reduction in Number of Jurors

In certain of the Western Provinces petit juries have been reduced to six jurors in some cases and eight in others. In England a special war-time measure provides for seven-man juries. Why the numbers six, seven or eight were chosen in the various jurisdictions indicated is difficult to understand and it would seem that the numbers in each case must have been chosen arbitrarily. It would be reasonable to conclude that the principle purpose for the reduction in numbers in each case was to effect a saving of expense, although no doubt in England the engagement of a large part of the man power and woman power in war services and war industries was an important factor. It is unlikely that a reduction in the number of jurors in criminal trials would meet with favour by either the judges, the profession or the public generally. The dissatisfaction resulting would probably not be commensurate with the monetary saving involved.

The Committee Therefore Recommends:

That the number of jurors constituting a jury in the Supreme Court, the courts of general sessions of the peace and the county and district courts be not reduced.

Right to Jury Trial

It has been suggested that the rules governing the trial of civil actions with the intervention of a jury should be altered so as to provide that every action shall be tried by a judge sitting without a jury unless the party desiring a jury satisfies the court that the questions in issue are more fit for trial by a jury than by a judge. This would, in effect, remove the *prima facie* right to a jury which exists in the case of most common law actions and would place the burden of establishing the right to a jury upon the litigant who asks for it.

In the view of the Committee the present practice is preferable. While a *prima facie* right to a trial by jury exists in most common law cases every opportunity is afforded to eliminate the jury in those cases where its use would not be suitable. The law relating to the right to a jury has become well established under the present practice whereas under the proposal indicated it would be virtually impossible to draft legislation which would effectively prevent rulings as to the right to a jury from varying with the viewpoints of the various judges. If the judges were to follow the present law in determining whether the questions in issue were more fit for trial by a jury than by a judge, there would be little advantage in making any amendment. If they were not to follow the present law their rulings would vary greatly according to the personal views of each judge.

The Committee would also reject the proposal because the right to a trial by jury should not depend solely upon the discretion of a judicial or other officer and the *prima facie* right to a jury which now exists, with certain well established exceptions, should be preserved.

THE COMMITTEE THEREFORE RECOMMENDS:

That the right to a trial by jury which exists under the present law and practice should not be altered.

SPECIAL JURIES

Figures furnished to the Committee indicate that the average number of special juries which are required by litigants in Ontario does not exceed two or three each year. So far as the Committee was able to ascertain a special jury has never been used in a county court trial and has been asked for on only one occasion in connection with criminal proceedings.

While the legislation permitting a special jury to be required by a litigant has been criticized as a law for the rich, the fact that the party requiring a special jury must pay the cost of it in the first instance meets that objection to a large extent. Experienced counsel expressed the view that the trial of certain types of cases by a special jury is desirable and that the retention of the right to such a trial is important. No one strongly advocated the abolition of special juries. The present machinery for calling a special jury is working very satisfactorily. The panels used are those which are prepared for grand jury purposes so that no great difficulty or inconvenience is occasioned to anyone when a special jury is required. The Committee sees no advantage in discontinuing special juries in the Supreme Court of Ontario.

It is to be observed that where a special jury is required, it shall consist of persons whose names appear on the roll of grand jurors for the Supreme Court or on the roll of grand jurors for the inferior courts for the year in which the notice to the sheriff is given. Both rolls are used. If grand juries are abolished in the court of general sessions of the peace, the selection would be limited to the roll of grand jurors for the Supreme Court. While the roll of grand jurors for the Supreme Court in Toronto usually contains more than 200 names, which is ample for the selection of a special jury, the number is considerably less in many of the other counties and districts. This, however, does not constitute a problem for the sections of The Jurors Act respecting special juries provide for the taking of names from the roll of grand jurors for another year to make up a total of 40 names.

The situation would not be greatly altered by eliminating grand juries in the general sessions. As indicated above so far as the Committee is aware, a special jury has never been required in a trial in a county or district court. That is, however, not surprising having regard to the amounts involved in most county and district court actions and to the cost of a special jury. If, therefore, the abolition of grand juries in the courts of general sessions of the peace renders the elimination of special juries in county and district courts necessary or desirable, no serious objection can be taken. Moreover, apart altogether from the question of abolition of grand juries, the Committee is of the opinion

that the right to a special jury in county court actions is unimportant and that in the interests of simplification of procedure in the county courts, the right to trial by special jury in the county courts should be abolished.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That present provisions as to special juries in Supreme Court trials be not altered; and

2. That the right to trial by special jury in the county and district courts be abolished.

WOMEN JURORS

Women were made subject to the same liability as men for jury service in England by the Sex Disqualification (Removal) Act, 1919, which appears to have been the last measure necessary in that jurisdiction to render women equal to men in all aspects of the law.

In this province, in view of the passing of The Married Women's Property Act, the granting of the franchise to women, and the general tendency in all legislation to place women on the same footing as men, it is difficult to understand why women have not been made eligible to serve upon juries. Since women are recognized as being able to hold property, transact business, engage in professions and callings, and generally conduct themselves in the professional, commercial and industrial life of the province in the same manner as men, it would be unreasonable to argue that they lack the qualifications essential to a good juryman. In short, as women are regarded by most laws of the province relating to civil rights and the holding of property as citizens, they should have all the rights and duties of citizens. There is just as much reason why they should be required to attend courts and act as jurors on the trials of civil and criminal matters as men, and similarly there is just as much reason why they should claim and be granted the right to perform this service, which is an essential part of the administration of justice, as men.

According to the information of the Committee the system of mixed juries has been found to be very satisfactory both in England and in the States of the United States of America where it exists. Of course, consideration would have to be given to certain special provisions if women are to be permitted to sit upon juries. In England it is not necessary that the number of men and women called on a petit jury be equal. The names of the men and women on the panel are placed in one box and drawn indiscriminately until the jury is made up. However, the sheriff must select such a number of women as will bear the same proportion to the number of men on the panel as the total number of women bears to the total number of men listed on the jurors' book. A husband and wife must not be summoned to serve on the same occasion. A judge may, on the application of the parties, or any of them, or at his own instance, order that the jury shall be composed of men only or of women only. He may also on the application of a woman, grant exemption by reason of the nature of the evidence to be given or of the issues to be tried. Where a woman satisfies a summoning officer by medical certificate or otherwise that owing to a special condition of health she is or will be unfit to serve as a juror, the officer may grant her exemption. Some special exemptions applicable only to women would no doubt be

required. Members of certain religious orders living in convents are exempt under the English Act.

If women are to serve upon juries in Ontario, to be practical the enactment providing therefor must apply equally to juries in criminal and civil matters. Juries in both types of trials are chosen from the same panels and to permit women on juries in civil trials but not in criminal trials would unreasonably complicate statutory procedure relating to the selection of jurors and result in other ramifications which are not desirable.

There are three difficulties which should be overcome before the inclusion of women on juries is permitted in Ontario. The first is the provision of the Criminal Code which requires a jury in the trial of a capital offence to be kept together. (Section 945, subss. 3, 4, Criminal Code.) The second is a matter of interpretation. Whether the word "person" as used in the Criminal Code with reference to jurors includes women is a matter which should be clarified before any criminal trial in which women compose a part of the jury, is held. The third difficulty is one of accommodation. Many, if not all, of the court houses of the province would require alteration so as to accommodate mixed juries properly.

If the provision is made by legislation for mixed juries at a session of the Legislature held in the late winter or early spring of any year, the earliest time at which juries trying cases could include women would be almost two years later. This delay is occasioned by reason of the fact that regard for the new law would be required on the part of assessors as well as selectors. Sufficient time must also be allowed to permit necessary alterations in the court houses of the province to be made. For these reasons and because of the amendments to the Code which would be necessary, provision should be made in the provincial legislation for its coming into force by proclamation of the Lieutenant-Governor.

In conclusion the Committee feels that mixed juries are desirable because they will complete the full status of citizenship for women, will assist in alleviating the shortage of men resulting from the engagement of many men in war services and war industries, and will encourage discipline in the jury room and thus be conducive to more efficiency and expedition in the deliberation of juries.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That a system of mixed juries be adopted in Ontario so that women may be qualified to serve on juries the same as men; and

2. That in the legislation establishing such a system provisions similar to those in the English statute be included to ensure that the proportion of women on any jury would not be either unreasonably large or unreasonably small; to provide for exempting and excusing women from jury service in certain circumstances; and to prevent a husband and wife being included on the same jury.

LAW REVISION COMMITTEE

On January 10th, 1934, the Lord Chancellor of England appointed a committee "to consider how far, having regard to the statute law and to judicial

decisions, such legal maxims and doctrines as the Lord Chancellor may from time to time refer to the committee require revision in modern conditions."

Since its creation the committee has reported upon some eight matters referred to it by the Lord Chancellor but to indicate the type of legal problems referred to the committee it will be sufficient to quote the first four references which were made at the time of its appointment. They are as follows:

(1) The doctrine of no contribution between tort-feasors. (Merryweather v. Nixan, with special reference to the remarks of Herschell L.C. in Palmer v. Wick and Pulteneytown Steam Shipping Company Limited [1894] A.C. 318.)

(2) The legal maxim *actio personalis moritur cum persona*, and the rule that "in a civil court the death of a human being could not be complained of as an injury." (Baker v. Bolton (1808), 1 Campbell 493, and The Amerika [1914] P. 167, [1917] A.C. 38.)

(3) The liability of the husband for the torts of the wife. (Edwards v. Porter [1925] A.C. 1.)

(4) The state of the law relating to the right to recover interest in civil proceedings. (See in particular Roscoe's Nisi Prius, 19th Ed., Vol. 1, 508-12.)

It will be observed that in addition to indicating the matter upon which a report is requested, cases and texts which may be of assistance to the committee are also referred to. Other matters referred to the committee, as well as the reports of the committee, are available in the committee's reports which are published in pamphlet form by His Majesty's Stationery Office.

There appears to be no statutory authority for the creation of the committee in England. The members, who are appointed by the Lord Chancellor, number some fourteen or fifteen, and include members of the Bench and Bar and solicitors. No remuneration is paid to the members nor are they furnished with any elaborate staff. There is a secretary who is engaged in private practice. He is nominally unpaid but receives an *ex gratia* allowance from time to time averaging from £50 to £75 a year. He has a female assistant secretary who is employed in the Lord Chancellor's office but it is estimated that the total work of the committee does not occupy more than a thirtieth of her time. The committee has no other assistants.

The practice followed by the committee is that a subcommittee is appointed to consider each matter referred to it, and prepare a draft report thereon. The draft report is then considered by the full committee at which time a fairly lengthy discussion usually takes place. The committee sometimes requests experts in a particular sphere of law to prepare memoranda for its assistance, although this is not the general practice. After the report is drafted in final form and adopted by the full committee it is submitted to the Lord Chancellor and, if he thinks fit, he asks the Parliamentary draftsman's office to draft the necessary Bill which is submitted to the committee for its comments. The usefulness of the committee is indicated by the fact that several of its recommendations, after having been reduced to bill form, have become law.

In the State of New York a Law Revision Commission was established in 1934 by legislative enactment. It consists of seven members, two of whom are *ex officio* members, being the chairmen of the Committees on Judiciary in both houses of the State Legislature. The Commission is given a free hand to study and report upon such matters of a legal nature as it deems advisable. Reports of both the Lord Chancellor's Committee and the Law Revision Commission of New York State have been of interest and assistance in most jurisdictions where the common law system prevails.

Without reflection upon the New York State Commission and with the greatest respect for its accomplishments, this Committee favours the system under which the Lord Chancellor's Committee operates. This Committee is of opinion that the work undertaken by a Law Revision Committee should be subject to definite limitations. The system in England is to have the committee deal only with matters referred to it by the Lord Chancellor. While there is in Ontario no position corresponding to that of the Lord Chancellor, the Attorney-General, who is the Chief Law Officer of the Province and the head of the Law Department of the Government, is very properly the official who should, in a general way, supervise the work of a law revision committee and refer matters to the committee for study and report. The Committee, however, would not limit references to the law revision committee to "legal maxims and doctrines", being of the opinion that there are matters of "lawyers' law" arising out of the Statute law which might not be accurately described as either "legal maxims" or "doctrines", but which may appropriately be referred to such a committee.

If the practice of limiting the work of the committee, as suggested in the preceding paragraph is followed, the Committee is of opinion that the law revision committee would have ample assistance if one of the law officers of the Crown were appointed secretary of the law revision committee, in addition to his other duties. He would be expected to prepare a short brief of the existing law relating to the subject matter of each reference.

In determining who shall comprise the committee, while it is essential that all its members be selected from among the most able members of the Bench and Bar and the practising solicitors of the province, it would be unwise to overlook the fact that if power is given to appoint the members of the committee the person empowered to make the appointments would, of a certainty, be prevailed upon to appoint persons who might not be well qualified to act upon it. Such a situation should be avoided and accordingly the Committee considers it desirable to have as many of the appointments as possible of an *ex officio* nature. In providing for the appointments being made in this manner there should be no difficulty in ensuring that the committee comprises persons well qualified to serve upon it. This Committee has given much thought to the composition of a Law Revision Committee and suggests some of the persons whom it considers might well be appointed to serve upon such a committee.

The advisability of taking steps to promote law reform is capably discussed by Mr. C. A. Wright, K.C., S.J.D., Lecturer at the Osgoode Hall Law School, and Editor of The Canadian Bar Review, in an article entitled "Legal Reform and The Profession" (1937), 15 C.B.R. 633-641.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That a Law Revision Committee be appointed by the Attorney-General to study and report upon such matters of law as may be referred to it from time to time by the Attorney-General;

2. That the Attorney-General appoint a chairman of the committee from among its members;

3. That one of the law officers of the Crown be appointed by the Attorney-General to act as permanent secretary of the committee; and

4. That the committee be composed as follows:

(*a*) Two judges of the Court of Appeal for Ontario designated by the Chief Justice of Ontario or in default thereof by the Attorney-General;

(*b*) Two judges of the High Court of Justice for Ontario, designated by the Chief Justice of the High Court or in default thereof by the Attorney-General;

(*c*) A county court judge, designated by the Attorney-General;

(*d*) A district court judge, designated by the Attorney-General;

(*e*) The Attorney-General, or a law officer of the Crown designated by him;

(*f*) The Chairman of the Legal Bills Committee of the Legislative Assembly;

(*g*) The Treasurer of the Law Society or a Bencher designated by him;

(*h*) The Master of the Supreme Court of Ontario;

(*i*) The Vice-President of the Ontario Branch of the Canadian Bar Association, or one of the Ontario members of the Council of the Association designated by him, or in default thereof by the Attorney-General;

(*j*) The Dean of the Osgoode Hall Law School or a full-time member of the teaching staff of the Law School, designated by him, or in default thereof by the Attorney-General;

(*k*) The Head of the Department of Law of the University of Toronto, or a full-time member of the teaching staff of that Department, designated by him, or in default thereof by the Attorney-General;

(*l*) The Editor of the "Ontario Law Reports"; and

(*m*) The President of the Lawyers' Club of Toronto, or a member of the Club designated by him.

MAGISTRATES

The importance of ensuring that judges shall enjoy security of tenure of office so that they may discharge their judicial functions without any fear of interference or appearance of interference has long been recognized in Canada.

As to the judges of the superior courts, section 99 of The British North America Act provides for their removal only by the Governor-General on address of the Senate and House of Commons. The Judges Act, Canada, provides for a cessation of the payment of salary to judges of the Supreme Court of Canada, the Exchequer Court of Canada and any superior court in Canada and certain other judges upon the report of the Minister of Justice that a judge has become by reason of age or infirmity incapacitated or disabled from the due execution of his office.

As to county and district court judges, the Judges Act, Canada, provides for their removal "for misbehaviour or for incapacity or inability to perform their duties properly on account of old age, ill health or any other cause" as found by a judge or judges appointed to make inquiry under commission of the Governor-General in Council.

At the present time in this Province magistrates do not enjoy the same security of tenure of office that judges enjoy, and it is the opinion of the Committee that magistrates and judges should be placed upon substantially the same basis in this regard. In recent years the duties of magistrates have become more onerous than they formerly were and magistrates to-day exercise exceedingly important functions frequently requiring consideration of complicated law and circumstances. The magistrates try many indictable offences and prosecutions for breach of the Defence of Canada Regulations involving the liberty of the subject are determined by them. It is, therefore, the decided opinion of the Committee that the security of magistrates in the tenure of their offices should be ensured so as to exclude effectively any suggestion or appearance of interference. By way of precedent, in 1938 it was enacted by the Nova Scotia Legislature that "every police magistrate shall hold office for one year after his appointment during pleasure and thenceforth during good behaviour, but every deputy police magistrate shall hold office during pleasure." In the same Act it was provided that "no person shall be appointed a police magistrate who is not a barrister of the Supreme Court of Nova Scotia of at least three years' standing."

The Committee is of the opinion that all sitting magistrates who are appointed in the future should be barristers.

In view of the provisions relating to superannuation contained in The Public Service Act, the Committee is of the opinion that henceforth no one should be appointed a magistrate who has passed fifty-five years of age. Moreover, as recommended under the heading SUPERANNUATION, the Committee is of the opinion that the Public Service Superannuation Board should take steps to bring under the superannuation provisions of The Public Service Act, on a contributory basis, all magistrates who are not disqualified by reason of age.

The Committee is also of the opinion that magistrates should not hold office

after attaining the age of seventy-five years. In this regard the Committee feels that the provisions of the Judges Act, Canada, as to the retirement of county court judges when they have attained the age of seventy-five years afford a desirable analogy.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That every magistrate hold office during pleasure for the first two years after his appointment and that thereafter he be removable only for misbehaviour or for incapacity or inability to perform his duties properly on account of ill health or any other cause as found by a judge of the Supreme Court of Ontario appointed by the Lieutenant-Governor in Council to make inquiry regarding such misbehaviour, incapacity or inability;

2. That in the future no person other than a barrister duly qualified as such according to the law of Ontario be appointed as a sitting magistrate;

3. That in the future no person be appointed as a magistrate who has passed the age of fifty-five years;

4. That every magistrate retire from office when he has attained the age of seventy-five years; and

5. That the Public Service Superannuation Board take steps to bring under the superannuation provisions of The Public Service Act on a contributory basis all magistrates who are not disqualified by reason of age.

THE PARTNERSHIP REGISTRATION ACT

An infant may carry on business either in his own name or as a member of a partnership and the provisions of The Partnership Registration Act apply to infants as well as to other persons. Complaints were made to the Committee that the Act is being used for improper purposes. A creditor who has sued a partnership frequently finds when his case comes to trial that, although he had dealt with older persons, the partnership is in fact registered in the name of an infant or infants. It is not suggested that infants should be prevented from carrying on business but the situation complained of would, to a large extent, be remedied by requiring the declaration filed under The Partnership Registration Act to state the ages of the partners.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That the declaration filed under The Partnership Registration Act be required to state the age of any person named therein who is under twenty-one years of age and that all other persons named therein are over twenty-one years of age; and

2. That penalties be provided for persons furnishing any false information in any declaration filed under The Partnership Registration Act.

POOR PRISONERS DEFENCE

The provision of defence counsel for impecunious persons charged with criminal offences has never been a serious problem in Ontario. No case has been brought to the attention of the Committee where a person charged with a serious offence has been unable to obtain the services of competent counsel to defend him. The courts always protect the interests of accused persons in this regard. Furthermore, there are usually several experienced counsel available to conduct the defence of such persons. So far as appeals to the Court of Appeal are concerned a list of counsel who are willing to conduct appeals in criminal matters without compensation, when so directed by the Chief Justice, is on file at Osgoode Hall. It must be borne in mind also that any system of supplying counsel for poor prisoners would be open to abuse by persons who would otherwise find means of retaining counsel on their own account.

The Committee Therefore Recommends:

That in view of the willingness of the legal profession to defend impecunious prisoners and argue appeals on their behalf, and the possibility of and opportunities for abuse, a system of poor prisoners defence which would be provided by the Government at the expense of the taxpayers of the Province, should not be undertaken.

PRACTICE IN THE SHERIFF'S OFFICE

Encumbrances Against Goods

It has been recommended that writs of execution against goods which are now required to be filed in the sheriff's office should for purposes of convenience be filed in the county court clerk's office and that notices of intention to give security under section 88 of the Bank Act (Canada) which are now filed with the Assistant Receiver-General should also be required to be filed with the county court clerk. So far as notices under the Bank Act are concerned, the Province has no authority to legislate and whether the liens should be centrally registered at the office of the Receiver-General in each province, or registered at offices throughout the Province, is a matter of policy for the Parliament of Canada. In addition, as the present practice accomplishes a centralization of registration, any alteration in the practice might be considered a disadvantage.

While it may be argued that it would be a convenience to file writs of execution against goods in the county court clerk's office because other encumbrances against goods are filed there, it may similarly be argued that it is a convenience to have executions against goods filed in the sheriff's office because that is where executions against lands are filed. However, in many counties and districts of the Province a *de facto* amalgamation of the county court clerk's office and the sheriff's office has been effected, while in most, if not all, of the other counties and districts the offices of the sheriff and the county court clerk are in the same building.

The Committee Therefore Recommends:

That the present practice as to the registration of writs of execution against goods be not altered.

Creditors' Relief Act

It has been suggested that a sheriff should be required to give notice of moneys which he has on hand for distribution by publication in a newspaper. The Committee is of the view that a creditor who is sufficiently interested to reduce his claim to a judgment, has ample opportunity under the present practice to give notice of his judgment to the sheriff so that he will share in any moneys coming into the sheriff's hands and which are available for distribution.

The view has been expressed that the clerk of a division court who has money to distribute should be required to give notice to the sheriff so that the provisions of The Creditors' Relief Act would apply thereto. The division court is manifestly the court for the recovery of small debts, although in certain types of cases, which are the exception rather than the rule, the jurisdiction of the court extends to amounts which according to some views might not be classified as small debts. Further, in the division courts a person entering suit is required to make a deposit which is usually sufficient to carry his case through to judgment. The average amount involved and the average amount recovered in division courts are not to be compared with the average amount sued for and the average amount recovered in the higher courts. Where a judgment debtor is not able to pay the amount of a division court judgment it is usually very difficult to locate any fund available for the payment of the judgment and as a rule any such fund when located is not large. As divisions under The Creditors' Relief Act are made on a *pro rata* basis, if The Creditors' Relief Act were to apply to division court judgments a judgment creditor in the division court, having spent substantial time and money locating a fund out of which payment of his judgment might be made, would often find that he had located the fund for the benefit of creditors of the debtor having judgments in the higher courts, with very little benefit to himself.

The Committee Therefore Recommends:

1. That the present practice with regard to the distribution of money in the hands of the sheriff be not altered; and

2. That the provisions of The Creditors' Relief Act should not be made applicable to division court matters.

Exemptions under Execution Act

The chattels which are exempt from seizure under any writ of *fieri facias* issued out of any court are listed in section 2 of The Execution Act. The section is a very old one and while it served its purpose for many years its provisions are now far from satisfactory. It was enacted at a time when conditions of life were quite different from to-day and accordingly some of its language is ill-fitted to present-day conditions.

It is important that a provision of this kind should apply equally to all persons regardless of vocation or calling. While this is carried out to a degree in the section there are instances where some of its provisions would apply only to persons engaged in certain businesses the result being that by the combined effect of all clauses in the section certain persons are entitled to greater exemptions than others. This should be corrected.

THE COMMITTEE THEREFORE RECOMMENDS:

That the exemptions of chattels from seizure under The Execution Act be revised with a view to adapting them to modern conditions.

SALE OF LAND UNDER WRIT OF EXECUTION

A sheriff is not permitted to make a sale of land under a writ of execution within twelve months from the date on which the writ is delivered to him. Although a proposal was made to the Committee to reduce the period of twelve months the Committee is of opinion that no real need exists for any change and that the present period is a reasonable one.

THE COMMITTEE THEREFORE RECOMMENDS:

That the practice governing the sale of land under a writ of execution be not altered.

SEIZURE AND SALE OF COMPANY SHARES

In a report made to the Attorney-General by Mr. F. H. Barlow, K.C., some months ago a change in the practice relating to seizure and sale of company shares was recommended. While the recommendation has a good deal of merit so far as the sheriff's office and the legal profession are concerned, it has been found that, having regard to prevailing commercial practices, the proposal would not be feasible, and Mr. Barlow, who appeared before the Committee, has advised the Committee that since presenting his report he has changed his opinion with regard to the matter.

THE COMMITTEE THEREFORE RECOMMENDS:

That the practice regulating the seizure and sale of company shares be not altered.

SEIZURE OF BOOK DEBTS AND CHOSES IN ACTION

The provisions of The Execution Act enacted in 1929 which enable a sheriff to seize book debts and other choses in action do not indicate the manner in which the seizure may be made. While the provisions are workable in their present form, it is highly desirable that they should be amended and clarified so as to indicate the manner of making the seizure.

THE COMMITTEE THEREFORE RECOMMENDS:

That The Execution Act be amended to prescribe an effective and simple method of making seizures of book debts and other choses in action.

PRE-TRIAL PROCEDURE IN CIVIL MATTERS

The term "pre-trial procedure" refers to a practice now existing in some of the United States of America. While there are several reports on the system as it exists in various jurisdictions a very comprehensive report covering its

operation in several jurisdictions is contained in the Reports of the Section of Judicial Administration of the American Bar Association, 1938, which are published in pamphlet form.

It appears to be generally agreed that the purposes of the pre-trial meeting are three-fold,—(1) to narrow the issues; (2) to shorten and expedite trials, and (3) to avoid trials in cases which should not go to trial. According to the information which the Committee has, the system has been tried out in some seven or more jurisdictions and has been reported upon favourably in all but two such jurisdictions. It has been abolished in Los Angeles after a trial of some two and one-half years; in San Francisco, where it was established upon a voluntary basis, it has ceased to be used. It would appear that while perhaps feasible in all courts, with the possible exception of single judge courts, it is of most assistance in larger cities where the court lists have become very much congested. Pre-trial procedure was first used in 1929 by the surrogate court of Wayne County, Michigan, in which is located the City of Detroit. At that time the Common Law calender was 45 months behind and the Chancery calendar 24 months behind. The system has largely corrected this situation. The second jurisdiction to adopt pre-trial procedure was the City of Boston where in 1935 it was made applicable to cases on the jury list. There also the court lists were badly congested.

From the information which the Committee has before it, it appears that in the majority of jurisdictions where the system has been adopted the condition of the court lists has been such that a case upon reaching the trial list would not be tried for several months, if not years, and there appears to be no doubt that pre-trial procedure is of great assistance in remedying such conditions.

The adaptability of pre-trial procedure to cases in the Supreme Court of Ontario, with the exception of the courts held in the City of Toronto, is doubtful. It is generally agreed that pre-trial hearings must be held before a judge with power to dismiss or give judgment by default upon non-appearance of counsel; otherwise counsel would be able to take an arbitrary and independent attitude resulting in an impasse at the pre-trial hearing. Most authorities also agree that it is inadvisable to have the pre-trial judge preside at the trial. Settlements are often discussed at the pre-trial hearings and, however fair a judge may be, many counsel would feel prejudiced at the trial if it were to be held before the same judge with whom they had frankly discussed settlement at a pre-trial hearing. Because of the long distances involved, the amount of work which each of the judges of the trial division is now required to perform, and the fact that the judges of the trial division all reside in Toronto, it will be seen that as to cases arising outside of Toronto the system does not readily adapt itself to this province. In passing it may also be observed that the power to dismiss or give judgment at a pre-trial hearing, which power appears necessary to the success of the system, is something which may well be considered as altogether undesirable, for it would place in the hands of the judges power or the opportunity to force settlements before trial.

Whether or not pre-trial procedure would be workable in Toronto, it is the view of your Committee that there is no real need for it. The trial lists in the Toronto courts to-day are such that any person desiring to have his case heard expeditiously may have it brought on for trial without any unreasonable delay.

While the Committee does not doubt that there is merit in the system known as "pre-trial procedure", it is of opinion that the system is not adaptable to many of the courts of the province and is also satisfied that trials in the courts of Ontario are expeditiously disposed of without undue delay.

Reference was made by one of the witnesses appearing before the Committee to the English procedure known as "summons for directions" which is, in some respects, a variation of pre-trial procedure. According to the information of the Committee, experience has shown that such a procedure has a definite tendency to become perfunctory in nature, the result being that almost invariably upon the return of the summons an order for "the usual directions" is made. In the result and from the information at hand the Committee does not believe that such a procedure would have any real advantage over the procedure now followed in Ontario.

THE COMMITTEE THEREFORE RECOMMENDS:

That pre-trial procedure be not adopted in Ontario at this time.

RULES AND REGULATIONS GENERALLY

Under the heading RULES COMMITTEE the provisions in the statutes authorizing the making of rules of court are referred to. The statutes contain many other enactments providing for the making of rules and regulations. For example, the governing bodies of several professions and callings which are regulated by statute are authorized to make rules or regulations. Wide powers are given to the Benchers of the Law Society under The Law Society Act, The Barristers Act and The Solicitors Act. The judges may also make certain rules and regulations under The Solicitors Act. Under The Medical Act the Council of the College of Physicians and Surgeons of Ontario may make orders, regulations and by-laws as therein prescribed. The Board of Directors of the Royal College of Dental Surgeons of Ontario is required to make such by-laws as are deemed necessary for the purposes indicated in the Act. Rule making authority is vested in similar boards under The Pharmacy Act, The Drugless Practitioners Act, The Land Surveyors Act, The Architects Act, The Chartered Shorthand Reporters Act, The Chartered Accountants Act, The Certified Public Accountants Act, The Professional Engineers Act, The Veterinary Science Practice Act, The Embalmers and Funeral Directors Act and The Optometry Act, all of which Acts relate to professions and callings. It will be observed that in many of these enactments the rules, regulations or by-laws, as the case may be, require neither the approval of the Lieutenant-Governor in Council nor publication in the *Ontario Gazette*. Many other statutes authorize the making of regulations by the Lieutenant-Governor in Council, boards, commissions, Ministers of departments, and other authorities. While it is perhaps true that in most cases regulations must either be made or approved by the Lieutenant-Governor in Council, this requirement does not exist in every case.

As to the advantage of requiring all regulations to be passed or approved by the Lieutenant-Governor in Council, the Committee points out that such a practice is desirable because where regulations are made or approved by the Lieutenant-Governor in Council they are on file in the office of the Clerk of the

Executive Council and are available to any person having occasion to refer to them. Where, however, regulations are not required to be made or approved by the Lieutenant-Governor in Council there is no assurance that either the original regulations or copies will be available for inspection by the public generally or by any person interested. Rules, regulations and other forms of delegated legislation when made in accordance with the authorizing statute form a part of the law of the province to the same extent as the statutes passed by the Legislature. The practice of delegating legislative authority is increasing in all jurisdictions. It is generally recognized that this tendency is due to the increasingly complicated nature of industrial, commercial and other phases of civil life and of civil government. Hence, it is of paramount importance that all rules and regulations made under statutory authority be readily available for inspection by the public.

In order to create a central registration office for all rules and regulations passed under the public acts of the province it is not necessary that all such regulations be either passed or approved by the Lieutenant-Governor in Council. The result may be attained by requiring that all regulations be filed with a named official and by providing that regulations shall have no force or effect until so filed. A provision would be required to take care of regulations now in force.

As all regulations which require to be passed or approved by the Lieutenant-Governor in Council are on file with the Clerk of the Executive Council, the Committee favours that office as a central place for the filing of all regulations, otherwise there would be a duplication of filing of those regulations which must now be filed in that office.

The publication of rules and regulations has been considered by this Committee. It has been suggested that all regulations should be consolidated in somewhat the same manner as the Revised Statutes, and that an annual volume corresponding somewhat to the annual volume of statutes should be published. One of the reasons that the provisions contained in the regulations are not enacted in the statutes authorizing the regulations is that regulations contain provisions requiring more flexibility than is possible with statutory enactments. The statutes are amended during the sessions of the Legislature and with few exceptions there is only one session held each year. While the amendments to public acts passed at each session of the Legislature occupy many pages of the statute book their volume cannot be compared with the volume of amendments to regulations made annually. Further, there are many regulations which are not of general interest. While these facts do not affect the desirability of making the regulations available for interested persons to inspect, they do reduce the necessity for publication.

An alternative mode of publication would be to require that all regulations be published in the *Ontario Gazette* before they have the force of law. However desirable such a requirement might be, the practical aspect must be considered. In this regard there are occasionally sets of regulations passed which would occupy many pages in the *Gazette* but which very few persons would have occasion to consult. In the case of such regulations the Committee feels that the expense involved would not be warranted.

Certain statutes authorizing the making of regulations require that they

be published in the *Ontario Gazette*. In such cases the regulations are invariably published. Other regulations made or approved by the Lieutenant-Governor in Council which in the opinion of the Clerk of the Executive Council, acting on the advice of those having special knowledge of the regulations, are of a general nature having general application, are also published although publication is not required by the statute.

The practice adopted not long ago of publishing a table of proclamations, orders-in-council and regulations which have been passed by the Lieutenant-Governor in Council, in the annual volume of the statutes has proven a convenience to members of the profession and others who have occasion to refer to regulations. It is desirable and would be feasible, if the Committee's recommendations contained in this part of the report are adopted, to publish in a similar manner a list of all rules and regulations which have been passed during the preceding year and up to the time of the publication of the annual statutes.

The Committee Therefore Recommends:

1. That all rules, regulations and other delegated legislation passed under the authority of any Act of the Legislature be required to be filed with the Clerk of the Executive Council within thirty days of being passed or approved, as the case may be; that all rules, regulations and other delegated legislation heretofore passed be required to be filed with the Clerk of the Executive Council not later than January 1st next following the session of the Legislature at which legislation requiring such filing is enacted; and, that any such rules, regulations or other delegated legislation not so filed should have no force or effect. (This provision would not affect regulations required to be made or approved by the Lieutenant-Governor in Council as they are now required to be filed with the Clerk of the Executive Council);

2. That the Clerk of the Executive Council be required to keep an index of rules, regulations and other delegated legislation according to subjects as well as according to the Acts under which such delegated legislation is passed; and

3. That a list of all rules and regulations passed during each year be published in the annual volume of the Statutes.

RULES COMMITTEE

Centralization of Authority

Probably the most important provision in the Statutes authorizing the making of rules for regulating practice and procedure in the courts is contained in section 106 of The Judicature Act. The first subsection confirms the revision of the Rules of Practice and Procedure made in 1913, including tariffs of fees and costs proclaimed by the Lieutenant-Governor in Council, and authorizes the judges of the Supreme Court of Ontario to "pass rules repealing, amending or varying the same". The second subsection authorizes the judges of the Supreme Court to amend or repeal any of the rules and to make any further or additional rules for carrying The Judicature Act into effect and particularly for regulating

and otherwise dealing with the matters indicated in the various clauses. No limitation is placed on the powers of the judges in this regard except that the Lieutenant-Governor in Council must approve of any regulations made by the judges which regulate fees payable to the Crown in respect of proceedings in any court. The rules made by the judges may modify the practice or procedure prescribed by any Statute where such modification is deemed necessary to adapt the rules to the general practice and procedure of the court, unless that power is expressly excluded. Section 108 permits the judges to delegate to a committee of themselves any power or authority conferred upon them as a body. Further powers are given to the judges to make rules under The Controverted Elections Act, The Habeas Corpus Act, The Administration of Justice Expenses Act, The Estreats Act, The Quieting Titles Act, The Matrimonial Causes Act, The Solicitors Act, The Municipal Act and The Municipal Arbitrations Act.

By The Interpretation Act the Lieutenant-Governor in Council is authorized to make regulations for the due enforcement and carrying into effect of any Act of the Legislature. Claus (*zh*) of section 32 of The Interpretation Act reads as follows:

> (*zh*) "Rules of Court" when used in relation to any court shall mean rules made by the authority having power to make rules or orders regulating the practice and procedure of such court, or for the purpose of any Act directing or authorizing anything to be done by rules of court.

The Lieutenant-Governor in Council is authorized to make rules relating to practice and procedure in the courts under The County Courts Act, The General Sessions Act, The Surrogate Courts Act, The Division Courts Act, The Charities Accounting Act, The Adoption Act and The Juvenile and Family Courts Act. Under The Land Titles Act certain general rules may be made by the Lieutenant-Governor in Council or the judges of the Supreme Court, while under The Registry Act the Lieutenant-Governor in Council is authorized to make rules. The Supreme Court may make rules under The Mental Incompetency Act. The Arbitration Act authorizes the making of rules of court "by an authority to whom is committed power of making rules of court", and The Reciprocal Enforcement of Judgments Act simply provides that rules of court for regulating the practice and procedure "may be made". The Devolution of Estates Act provides that "rules regulating the practice and procedure to be followed in all proceedings under this Act and a tariff of fees to be allowed and paid to solicitors for services rendered in such proceedings, may be made under the provisions of The Judicature Act".

The Mechanics Lien Act simply provides for procedure "of a summary character". The Woodmen's Lien for Wages Act permits the judges of the district courts or a majority of them to "prepare and adopt forms of writs, summonses, attachments and other forms for the more convenient carrying out of the provisions of this Act". The Infants Act incorporates by reference the practice and procedure under The Surrogate Courts Act and provides that "the power to make rules under that Act shall apply to proceedings under this Act". The Municipal Drainage Act authorizes the judges of the Supreme Court "to make general rules with respect to procedure before the Referee and appeals from him . . .", and subject to those powers the Referee is also empowered, with the approval of the Lieutenant-Governor in Council, to frame rules regulating

the practice and procedure in all proceedings before him and also to frame tariffs of fees in cases not already provided for.

There are no doubt other provisions in the Statutes authorizing the making of rules which regulate the practice and procedure in the courts but from the foregoing it is apparent that while the judges of the Supreme Court are authorized to make many rules regulating practice and procedure in the courts they are by no means the only rule making authority with regard to practice and procedure in the courts. Nor does there appear to be any satisfactory explanation why so many rule making bodies should exist. In some of the instances cited above it is difficult to understand why authority with regard to the matters in question is given to the particular body so vested.

The distribution of authority has several disadvantages. It renders it difficult, if not impossible, to collect the rules regulating procedure in the various courts with any degree of certainty. The distribution of authority is not conducive to keeping the various sets of rules either consistent in their provisions or uniform in their drafting. It is desirable that one body should be vested with power to make all rules regulating practice and procedure in the courts as far as practicable. The Committee feels that it is not desirable to charge the body responsible for the making of rules in the higher courts, with the making of rules for the division courts, procedure in that court being of a specialized nature and not necessarily in conformity with the procedure in the other courts of the province. Persons well qualified to formulate rules for the higher courts might be quite unfamiliar with division court procedure.

Composition of Committee

In Ontario the judges of the Supreme Court are usually regarded as the rule making authority with regard to practice and procedure in that court. With the exception of certain comparatively minor matters of practice and procedure all the powers to make rules of practice and procedure in the Supreme Court are vested in the judges. There being no barristers or solicitors upon the rule making committee, any new rules or amendments to the rules are necessarily made from the point of view of the judges rather than from that of members of the profession experienced in practice, although members of the profession, of course, may make representations to the judges regarding amendments to the rules. In England a different practice is followed and by subsection 24 of section 29 of The Supreme Court of Judicature (Consolidation) Act, 1925, it is provided:

> "Rules of court may be made by the Lord Chancellor together with any four or more of the following persons, namely, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Division, and four other judges of the Supreme Court, two practising barristers being members of the General Council of the Bar, and two practising solicitors of whom one shall be a member of the Council of the Law Society and the other a member of the Law Society and also of a provincial Law Society. The four other judges and the barristers and solicitors to act as aforesaid shall be appointed by the Lord Chancellor in writing under his hand and shall hold office for the time specified in the appointment."

The practice of having barristers and solicitors represented on the committee

ensures that the point of view of the profession as well as the Bench is before the committee. This is important for while each of the judges from time to time is concerned with matters of practice in weekly court or chambers or in other branches of his work, certain members of the profession, who appear regularly in weekly court and chambers and before the Master, are in contact with difficult matters of practice and procedure more frequently in the regular course of their practice than some of the judges. The advantages to be gained by having the profession represented on the committee are self-apparent while the Committee was not able to ascertain that any disadvantages would result.

As the executive branch of the government is responsible for the maintenance of the courts, it is desirable to have the executive represented upon the rule making committee. This may be done appropriately by appointing the Attorney-General to the committee or by authorizing him to nominate one of the lawyers of his Department to represent him on the committee.

It is desirable that such a committee should have the assistance of a permanent secretary, skilled in the work with which the committee is charged and always available. The Committee considers that the Registrar of the Supreme Court is the logical official to act in that capacity.

Approval of Rules

While some of the problems relating to rules and regulations made under provincial Acts are dealt with in another part of this report, at the expense of possible repetition it is well to point out here that rules, regulations and other delegated forms of legislation as authorized by the Statutes are just as much a part of the law of the Province as that contained in the Statutes. In the Consolidated Rules of Practice many matters are dealt with which are not entirely procedural and in many cases the rights of the subject are vitally affected. In view of this situation the Committee favours a requirement that all rules and regulations relating to the courts be approved by the Lieutenant-Governor in Council before having the force of law.

Rules in One Text

That rules made by the Rules Committee under the various statutes should be conveniently printed in one text naturally follows from the recommendations of the Committee which are set out below. Such a practice should prove a matter of convenience to the profession as well as to court officials and the general public throughout the province.

Amendments Required

If the recommendations of the Committee contained in this part of the report are to be carried into effect, amendments to many Statutes will be necessary, which is not a matter of any great difficulty. It may be pointed out, however, that this does not necessitate new rules under the various Statutes indicated above being brought into force immediately upon the coming into force of the statutes providing for the establishment of the new Rules Committee, for by section 16 of The Interpretation Act the old rules shall continue good and valid until others are made in their stead. It will, however, be necessary to

amend the definition of "Rules of Court" contained in The Interpretation Act, and it is also desirable that the term "Rules Committee" be defined in that Act.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That a committee be established by statute with authority to make, amend and repeal all rules authorized to be made under any statute of Ontario for regulating practice and procedure in the courts over which the Provincial Legislature has jurisdiction but excluding division courts;

2. That such Committee comprise six justices of the Supreme Court appointed by the Chief Justice of Ontario; one county or district court judge appointed by the Attorney-General; three barristers or solicitors chosen by the Benchers of the Law Society in Convocation; the Master of the Supreme Court and the Attorney-General, or a law officer of the Crown appointed by him;

3. That the members of the Committee elect a chairman from among themselves;

4. That the Registrar of the Supreme Court of Ontario be the permanent secretary of the rule making committee;

5. That all rules made by the Rules Committee be approved by the Lieutenant-Governor in Council before coming into force;

6. That all rules of practice and procedure in the courts (with the exception of division courts) be published in one text;

7. That the definition of "Rules of Court" as contained in The Interpretation Act be appropriately amended, and that "Rules Committee" or such other term as may be used to designate the proposed rule making authority, be defined in The Interpretation Act; and

8. That the authority to make rules under The Division Courts Act continue in the Lieutenant-Governor in Council and that such authority be extended to enable the Lieutenant-Governor in Council to prescribe forms for use in the division courts.

SERVICE BY MAIL

The requirement that summonses and other process for violation of Ontario statutes be served personally adds substantially to the cost of proceedings in the courts, and occupies a great deal of the time of police officers and others who are engaged in making services. Many complaints have been received by the Attorney-General and other Crown officials regarding the amount of the costs which attach where a conviction is made under an Ontario statute and almost invariably it is found that such costs are made up principally of charges for effecting service. In England service of certain summonses by mail was authorized by the Service of Process (Justices) Act, 1933. That Act provides that service made pursuant thereto shall however be deemed not to have been effected unless either (*a*) the defendant appears, either in person or by counsel or solicitor, in manner required by the summons; or (*b*) it is proved to the satisfaction of the justices that the summons came to the knowledge of the defendant. While that qualification has been criticized, it appears to the Committee

to be a very necessary one although experience in some of the States of the Union indicates that the necessity of such a provision is doubtful. In a report on "The Growth of Legal Aid Work in the United States", issued by the United States Department of Labour, it is stated at page 41—"In fact service by mail works so well that the Cleveland court, which has used it longest, has discarded registered mail and uses the ordinary mail not merely in small cases but as a regular method of service in all municipal court cases." In order that a person so served may realize that it is in his interest to appear in response to the summons it would be well to indicate, preferably in bold faced type, on the face of the summons, that if personal service becomes necessary, the costs of the proceeding will thereby be increased and may have to be paid by the person to whom it is directed.

A great many prosecutions under Ontario statutes are in respect of violations of The Highway Traffic Act. The licensing system in force under that Act facilitates ascertaining of the names and addresses of offenders in most cases. Because of that fact and because the practice of service by mail is an innovation in Ontario, the Committee favours the adoption of that practice with respect to offences under The Highway Traffic Act. If, when applied to that Act it proves as satisfactory as it has in other jurisdictions, it may be extended to other Ontario statutes.

In order to avoid the purpose of the proposed provision being defeated, service by mail must necessarily be required in each case before personal service is resorted to.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That summonses for violations of The Highway Traffic Act be required to be served by mail;

2. That the summons indicate clearly upon its face that if the defendant does not appear in person or by his representative in the manner required by the summons, service will be effected by personal service and the cost of the proceedings will thereby be increased and may be required to be paid by the person to whom the summons is directed if a conviction results;

3. That provision be made for personal service if the person summoned fails to appear in person or by his representative in the manner required by the summons sent by mail; and

4. That the limitation provision of The Highway Traffic Act be appropriately amended to permit service to be made in accordance with these recommendations.

SUPERANNUATION

COUNTY COURT CLERKS AND LOCAL REGISTRARS, SUPREME COURT OF ONTARIO

While the matter of superannuation does not come within the scope of the Committee's investigation, certain phases of that part of The Public Service Act relating to superannuation were studied briefly by the Committee because

of representations made to it by witnesses who appeared before the Committee to express views with regard to other matters.

The superannuation provisions do not apply to county court clerks or local registrars of the Supreme Court, because the Act applies only to civil servants paid a fixed salary and practically all county court clerks and local registrars are paid on the fee basis in one form or another. Most sheriffs are also paid on the fee basis but, because of a special provision inserted in the Act, they are brought within its superannuation provisions. The Committee was unable to ascertain any logical reason why the Act should be made applicable to sheriffs while other civil servants doing a similar type of work and paid on a like basis and similarly located throughout the province are excluded from the operation of its superannuation provisions.

Magistrates

So far as the payment of salaries is concerned there are two classes of magistrates within the Province. There are those who are paid by the Province, the Province being reimbursed to some extent by receiving a portion of the fines imposed by such magistrates which would otherwise be payable to the municipalities. Payments are made to the Province under subsection 2 of section 15 of The Magistrates Act. So far as these magistrates are concerned there is no difficulty regarding superannuation if they are within the age limit set by the Act when appointed.

The other class of magistrates are those appointed for a particular city in which they hold courts. While all magistrates are appointed for the entire province, some of them are, by the Order-in-Council appointing them, assigned to certain named cities and in the case of these cities the salaries of the magistrates are paid by the cities. Accordingly, as the salaries of these magistrates are not paid by the Province they are not entitled to come within the superannuation provisions of The Public Service Act. This situation could probably be remedied by having the salaries paid by the city to the Province or by some other means.

The Committee Therefore Recommends:

1. That the Public Service Superannuation Board consider the extension of section 53 of The Public Service Act to county court clerks and local registrars of the Supreme Court; and

2. That the Public Service Superannuation Board take steps to bring under the superannuation provisions of The Public Service Act, on a contributory basis, all magistrates who are not disqualified by reason of age.

TAXATION OF COSTS

Although the local taxing officers may tax most items in a bill of costs, certain items must be referred to the Senior Taxing Officer at Toronto. Hence, if a trial takes place outside of Toronto solicitors or counsel must either attend at Toronto or instruct Toronto agents as to the taxation of costs thereby involving expense and inconvenience.

As most local taxing officers are appointed from the ranks of practising barristers, there appears to be no objection to giving local taxing officers jurisdiction in such matters. Any objection which might be taken on the ground that taxations would lack uniformity may be remedied by providing for an appeal to the Senior Taxing Officer at Toronto in all such cases. The present practice is advisable where the local taxing officer is not a barrister.

THE COMMITTEE THEREFORE RECOMMENDS:

That all local taxing officers who were barristers at the time of appointment be empowered to tax all costs including all counsel fees, subject always to an appeal to the Senior Taxing Officer at Toronto.

TRIAL COURT LISTS

Much time is lost and inconvenience occasioned to parties, counsel and witnesses by reason of the present indefinite and unsatisfactory method of preparing trial court lists. The practice followed in most of the courts of the Province is to indicate only the names of the cases which are to be tried the following day. In the Toronto non-jury court a list is prepared weekly and this practice may be followed in some of the other courts of the province. So far as the Committee is aware in no case does the list indicate the nature of the cases or the approximate time which each will require for trial. On more than one occasion an action has been dismissed because of the non-appearance of the plaintiff or his counsel. Under the present practice litigants, counsel and many witnesses may be kept waiting about court rooms, witness rooms or hallways for long periods of time.

The Committee feels that this condition is wrong. While the convenience of the court is of great importance, so also is the convenience of the public, counsel and the witnesses involved.

In the King's Bench Division of the High Court of Justice in England there are two non-jury lists. One is called the "List of Long Non-Jury Actions" and the other the "List of Short Non-Jury Actions." Examples of these two lists may be found in The Weekly Notes. Upon each list the nature of the action is indicated briefly, also the approximate time which the action will require for trial. The List of Long Non-Jury Actions includes actions which will occupy six or more hours.

There is no reason why the practice of indicating the nature of the action and the approximate time it will occupy should not be adopted in all civil courts, with the exception of the division courts, throughout the province. The manner of determining the approximate time which any trial would occupy might require some study and that is likely one of the details which receives attention in England upon the return of the "summons for directions", a procedure unknown in Ontario practice.

In view of the many matrimonial causes actions tried at the Toronto non-jury sittings, the trials of most of which last only a short time, the practice of preparing two lists is desirable in that court and should be followed whenever two judges are holding sittings.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That the practice of indicating the nature of each action and estimated time for the trial thereof upon the list of cases for trial be followed in all civil courts in Ontario with the exception of division courts; and

2. That the practice of the King's Bench Division of the High Court of Justice (England) of preparing a list of long non-jury actions and a list of short non-jury actions be adopted and used in the non-jury sittings of the Supreme Court of Ontario at Toronto whenever two or more judges are holding sittings.

WITNESSES

Throughout the trial of an action the judge, jury, the registrar or clerk of the court and the sheriff remain seated. Counsel are seated except when actually addressing the court or examining or cross-examining witnesses and persons who are charged in criminal proceedings are permitted to remain seated except when addressed by or addressing the court. In Ontario, however, witnesses are required to remain standing except when by reason of infirmity or some exceptional circumstance they are permitted by the court to sit down.

The unusual experience of appearing as a witness in a court proceeding, often before a large number of people, is a nervous strain on many persons. This condition is not reduced by requiring the person called as a witness to stand, frequently for a long period of time, and some times under arduous cross-examination. The Committee is of opinion that as a general rule nothing is to be gained by requiring witnesses to stand while giving their testimony.

Most of the court rooms of the Province, however, are constructed in such a manner that in order to be visible by and audible to the judge, the jury and counsel, the witness must assume a standing position.

THE COMMITTEE THEREFORE RECOMMENDS:

That so far as practicable witnesses be permitted to remain seated while giving their testimony, and that in constructing or altering court rooms, provision be made, wherever possible, for the seating of witnesses in the witness box.

CONCLUSION

In conducting its enquiry and preparing its report the Committee has endeavoured to deal only with matters included in the terms of the order appointing it. It has, however, been difficult on occasions to determine the scope of the Committee's investigation with regard to certain matters coming before it because the language authorizing an investigation covering such a wide field must necessarily be of a general and somewhat flexible nature. The Committee has, however, avoided dealing with minor matters of procedure, proposals for specific amendments to statutes, and other suggestions for changes in the law, except where in its opinion such suggestions or proposals were directed to improving the constitution, organization and system of maintenance of the courts

or simplifying, facilitating, expediting and otherwise improving the practice and procedure in the courts, or effecting economy to the people, the municipalities and the Province generally.

There are, accordingly, numerous matters which were brought to the attention of the Committee which, while not coming within the Committee's jurisdiction, warrant further consideration. In some cases the Law Revision Committee recommended by this Committee would be the appropriate body to consider such matters further, and in other cases the officials of the Attorney-General's Department or the Legislative Counsel's office might very well be charged with the further study required. It should, therefore, be understood by those who assisted the Committee by making submissions that the absence of any reference to any submission in this Report is not necessarily an indication that the Committee does not approve of the suggestion or recommendation made in the submission.

All of which is respectfully submitted.

G. D. Conant, Chairman,
Ian T. Strachan,
R. D. Arnott,
L. M. Frost.

SCHEDULE "A" TO REPORT

List of Persons and Organizations who were Advised of the Appointment and Sittings of the Committee

The Chief Justice of Ontario.
The Chief Justice of the High Court of Justice.
The Registrar, S.C.O., Toronto.
The Local Registrar, S.C.O., Ottawa.
The All Canada Insurance Federation.
The All Canadian Congress of Labour.
The Associated Credit Bureaus.
The Builders Exchange and Construction Association of Toronto.
The Canadian Automobile Association.
The Canadian Bankers Association.
The Canadian Bar Association.
The Canadian Life Insurance Officers Association.
The Canadian Manufacturers Association.
The Canadian Retail Coal Association.
The Canadian Underwriters' Association.
The Chamber of Agriculture.
The County Court Clerks Association.
The County Judges Association.
The Dean of the Law School, Osgoode Hall.
The Division Court Clerks Association.
The Dominion Board of Insurance Underwriters.
The Dominion Mortgage and Investment Association.
The Hamilton Chamber of Commerce.
The Head of the Law Department, University of Toronto.
The Land Mortgage Companies Association.
The Law Society of Upper Canada.
The Lawyers Club of Toronto.
The London Chamber of Commerce.
The Lumbermen's Credit Bureau Incorporated.
The Magistrates Association.
The Ontario Associated Boards of Trade and Chambers of Commerce.
The Ontario Association of Architects.
The Ontario Association of Real Estate Boards.
The Ontario Fire & Casualty Insurance Agents' Association.
The Ontario Insurance Adjusters Association.
The Ontario Mayors Association.
The Ontario Mining Association.
The Ontario Municipal Association.
The Ottawa Board of Trade.
The Property Owners' Association.
The Registrars of Deeds Association.
The Retail Merchants Association of Canada.
The Sheriff's Association.
The Toronto Board of Trade.
The Toronto Home Builders' Association.
The Toronto Insurance Conference.
The Trades and Labour Congress of Canada.

The Windsor Chamber of Commerce.
All County and District Law Associations.
All County Wardens.
All Crown Attorneys.

SCHEDULE "B" TO REPORT

List of Witnesses in Order of Appearance Before the Committee

F. H. Barlow, K.C., Master of the Supreme Court of Ontario.
His Honour Judge F. M. Morson, retired judge of the County Court of the County of York.
F. J. Norman, Secretary of the Ontario Association of Collection Agencies.
F. G. J. McDonagh, Clerk of the First Division Court of the County of York.
His Honour Judge T. H. Barton, a judge of the County Court of the County of York.
Gerald Murphy, of McMaster, Montgomery, Fleury & Co.
J. Roy Cadwell, Inspector of Legal Offices.
C. L. Snyder, K.C., Deputy Attorney-General for Ontario.
A. B. Gillies, Postmaster, Parliament Buildings, Toronto.
R. C. Buckley, Assistant Inspector of Legal Offices.
A. S. Winchester, Clerk of the County Court of the County of York and Registrar of the Surrogate Court of the County of York.
Dr. Horace Bascom, Local Registrar, S.C.O., Clerk of the County Court, Registrar of the Surrogate Court, Sheriff, County of Ontario, and President of the County Court Clerks Association.
George T. Inch, Local Registrar, S.C.O., Clerk of the County Court, Registrar of the Surrogate Court, County of Wentworth, and Secretary of the County Court Clerks Association.
P. A. Juneau, K.C., Special Law Officer, Department of the Attorney-General for the Province of Quebec.
D. L. McCarthy, K.C., Treasurer of the Law Society of Upper Canada.
Peter White, K.C.
J. C. McRuer, K.C.
G. T. Walsh, K.C.
G. W. Mason, K.C., Chairman of a Special Committee of Convocation of the Law Society of Upper Canada.
K. F. Mackenzie, K.C., Vice-President for Ontario of The Canadian Bar Association.
His Honour Judge L. V. O'Connor, Judge of the County Court of the United Counties of Northumberland and Durham.
G. A. Gale, representing The Lawyers' Club of Toronto.
His Honour Judge G. H. Hayward, Judge of the District Court of the District of Temiskaming.
R. M. Fowler, representing the Management Committee of the County of York Law Association.
F. A. Matatall, Secretary Manager of the Ottawa Credit Exchange Limited and President of the Associated Credit Bureaux of Canada.
R. M. W. Chitty, K.C., representing the Board of Management of the York County Law Association.
The Rt. Hon. Sir Wm. Mulock, K.C.M.G., sometime Chief Justice of Ontario.

R. J. Maclennan, K.C., Solicitor to and Secretary of The Sheriffs Association of Ontario.

Earle Dawe, Vice-President and Manager of E. W. Woods & Co., Limited, Bailiffs.

Stanley Thomson, Registrar of Real Estate Brokers and Registrar under The Collection Agencies Act.

David J. Ogle of the office of the Sheriff of the County of York.

His Honour Judge Daniel O'Connell, Senior Magistrate for the County of York and sometime a judge of the County Court of the County of York.

J. W. McFadden, K.C., Crown Attorney for the County of York.

J. G. Hungerford, an Estates Officer of The National Trust Company.

Harold S. Manning, K.C., President of The Property Owners' Association of Ontario.

C. M. Colquhoun, K.C., Solicitor for the City of Toronto.

Alfred J. B. Gray of the Department of Municipal Affairs for Ontario.

Chas. Purnell, representing the Ontario Association of Real Estate Brokers.

R. S. Colter, K.C., Chairman of the Ontario Municipal Board.

Wm. H. Bosley.

C. F. Neelands, Deputy Provincial Secretary.

A. G. Slaght, K.C.

Jacob Finkleman, Professor of Administrative and Industrial Law, University of Toronto.

The Honourable R. S. Robertson, Chief Justice of Ontario.

The Honourable H. E. Rose, Chief Justice of the High Court.

The Honourable Mr. Justice W. E. Middleton.

His Honour Judge James Parker, Senior Judge of the County Court of the County of York.

I. S. Fairty, K.C., Chief Legal Adviser to The Toronto Transportation Commission.

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